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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 24.

LEHIGH VALLEY RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, CHARLES BROWNE, as members, &c., *et als.*,

Defendants.

Filed November 25, 1927. (File No. 33,082.)

No. 54.

LEHIGH VALLEY RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, CHARLES BROWNE, as members, &c., *et als.*,

Defendants.

Filed January 27, 1928. (File No. 33,174.)

Appeals from the District Court of the United States for the District of New Jersey.

BRIEF FOR APPELLANT

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Filed January 27, 1928. (File No. 33,174.)

Appeals from the District Court of the United States for the District of New Jersey.

BRIEF FOR APPELLANT

THE OPINION OF THE COURT BELOW.

The opinion in the District Court of the United States denying an interlocutory injunction is unreported. (R. 13.) On final hearing the bill of complaint was dismissed without further opinion.

JURISDICTION OF THIS COURT.

—1—

The date of the judgment under review is January 18, 1928 (R. 1).

—2—

The specific claims advanced, and the rulings made, in the District Court, relied upon as the basis of this Court's jurisdiction, are as follows:

The appellant filed its bill of complaint on June 1, 1927, praying for an injunction against the enforcement of an order of the Board of Public Utility Commissioners of New Jersey, for the elimination of certain grade crossings; the grounds for the injunction as set forth in the bill, insofar as they involve questions under the Federal Constitution and statutes, are:

Said order—

(a) Imposed upon the appellant (plaintiff below) a necessity for unreasonable expenditures for structures and maintenance of way in violation of Paragraph 2, Section 15a of the Act to Regulate Commerce as amended by the Transportation Act of 1920 (R. 26).

(b) Imposed upon the interstate commerce of the appellant an unreasonable and arbitrary requirement and constituted a direct interference with its commerce among the states and imposed a direct burden upon and impediment of said interstate commerce and created a discrimina-

tion against interstate commerce and otherwise impaired the usefulness of its facilities for such commerce in violation of Article 1, Section 8, Paragraph 3 of the Constitution and of the Act to Regulate Commerce as amended by the Transportation Act, 1920 (R. 27).

(c) Was an unreasonable exercise of the police power and thereby deprived the appellant of its property without due process of law in violation of the Fourteenth Amendment (R. 27).

(d) Confiscated the property of the appellant for the benefit of other persons and took its property for public use without just compensation, and denied to the appellant the equal protection of the laws and impaired the obligation of a contract between the appellant and the State of New Jersey (R. 27).

All these claims were overruled by the District Court in its opinion filed June 28, 1927 (R. 13).

After the filing of the opinion and before the entry of the order denying the interlocutory injunction, the appellant, on July 15, 1928, filed a petition for rehearing (R. 104) wherein it directed the Court's attention to the allegations of the bill of complaint, affidavits, and exhibits that the appellant's application to the Supreme Court for a writ of certiorari (which is the only method of review provided by the statutes of New Jersey) to review said order of the Board had been denied (R. 98), and that a renewal of that application before the New Jersey Supreme Court *in banc* had also been denied (R. 102); and then asked for the consideration of the decision of this court in the case of *Ohio Valley Water Company* v. *Ben Avon Borough* (253 U. S. 287).

In said petition the appellant set forth the following claims under the 14th Amendment (R. 106).

I.

The denial by the New Jersey Supreme Court of a review of said order of the Board of Public Utility Commissioners deprived the appellant of its property without due process of law, in that thereby the appellant was refused a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order confiscates the appellant's property.

II.

The statutes of the State of New Jersey under the authority of which said order was made (specifically named in said petition) deprived the appellant of its property without due process of law, in that thereby the appellant was deprived of the right to a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order confiscates the appellant's property.

The appellant in said petition claimed that the denial by the New Jersey Supreme Court of its application to review said order, and that the statutes of the State of New Jersey, as construed by the courts of that state, deprived the appellant of due process under the Fourteenth Amendment, as alleged in the complaint, in that by said denial the appellant was refused any opportunity to submit to a judicial tribunal for determination upon the independent judgment of such tribunal, both as to the law and the facts, the issue whether said order confiscates its property and in that, even if the Supreme Court of New Jersey had allowed a writ of certiorari to review said order, the statutes of said state limited the power of review of said Supreme Court of New Jersey to cases where it clearly appeared that there was no evidence before said

Board to support reasonably the order under review or that the same was without the jurisdiction of said Board.

Thereafter the petition for rehearing was denied and the motion for interlocutory injunction was overruled.

These claims were again overruled by the District Court by the final decree (without further opinion) filed January 18, 1928 (R. 1).

Pending the final hearing, which was had on January 18, 1928, an appeal was taken to this court from the order denying the interlocutory injunction; and same was placed on the calendar as Case No. 630 for the October term, 1927 (No. 24 at the present term). But before this appeal was reached for argument the case came on for final hearing in the District Court. It was, therefore, stipulated that the appeal from the order denying the interlocutory injunction should be argued upon the record of the appeal from the final decree, including said opinion of the District Court (R. 213).

An order allowing an appeal from the final decree of the District Court (with supersedeas) was made January 18, 1928 (R. 3).

— 3 —

The jurisdiction of this Court is invoked under Section 380, United States Code (Jud. Code, Sec. 266, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938).

— 4 —

The following cases sustain the jurisdiction of this Court:

Oklahoma Nat. Gas Co. v. *Russell*, 261 U. S. 290; 67 L. Ed. 659;

Prendergast v. *New York Tel. Co.*, 262 U. S. 43; 67 L. Ed. 853;

Louisiana Public Service Com. v. *Morgan's L. T. R. R. & S. S. Co.*, 264 U. S. 393; 68 L. Ed. 756;

Michigan Public Utilities Comm. v. *Duke*, 266 U. S. 570; 69 L. Ed. 445;

Western & Atlantic R. R. v. *Georgia Public Service Com.*, 267 U. S. 493; 69 L. Ed. 753;

Banton v. *Belt Line Ry. Co.*, 268 U. S. 413; 69 L. Ed. 1020;

Board of Public Utility Coms. v. *New York Tel. Co.*, 271 U. S. 23; 70 L. Ed. 808;

Missouri, etc., Ry. Co. v. *Oklahoma*, 271 U. S. 303; 70 L. Ed. 957.

In re Buder, 271 U. S. 461; 70 L. Ed. 1036;

Moore v. *Fidelity & Deposit Co.*, 272 U. S. 317; 71 L. Ed. 273;

Interstate Busses Corp. v. *Holyoke Street R. Co.*, 273 U. S. 45; 71 L. Ed. 530;

Smith v. *Wilson*, 273 U. S. 388; 71 L. Ed. 699;

Morris v. *Duby*, 274 U. S. 135; 71 L. Ed. 966;

Clark v. *Poor*, 274 U. S. 554; 71 L. Ed. 1199;

Lawrence v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588; 71 L. Ed. 1219.

Ex Parte Williams, U. S. Adv. Op. of June 15, 1928, p. 591; 72 L. Ed.

STATEMENT OF THE CASE.

There are two appeals from the District Court of the United States, for the District of New Jersey, [sitting as a statutory court under Section 266 of the Judicial Code, (Sec. 380, U. S. C.)]:

1. Appeal filed November 25, 1927, from an interlocutory decree entered August 10, 1927, denying an interlocutory injunction;

2. Appeal filed January 18, 1928, from a final decree, filed that day, dismissing the bill of complaint (R. 1).

By stipulation these appeals were merged for argument on the record of the second appeal (R. 213) (including the opinion of the District Court filed June 28, 1927 (R. 13).

Parties and Subject Matter.

Appellant is a citizen and resident of Pennsylvania, incorporated under the laws of that State and engaged in the operation of a steam railroad in and through the states of Pennsylvania, New York and New Jersey (R. 21, 22). The defendants who appeared and answered are the members of the Board of Public Utility Commissioners of the State of New Jersey.

The suit was brought to enjoin the enforcement of an order of said Board (Exhibit "A," R. 115) directing appellant to alter two grade crossings, one on a highway known as Camp Lane and the other on a highway known as State Highway Route No. 16, according to a plan annexed thereto and made a part thereof (R. 116). (Part of Exhibit "A," map between R. 116 & 117).

The Physical Situation.

The physical situation is shown on a composite map annexed hereto as Appendix "C."

Route No. 16 of the Highway System of the State of New Jersey crosses the railroad of the appellant, in a general direction of northeasterly and southwesterly, at grade in the Township of Hillsborough, Somerset County, N. J., at an angle of 29 degrees with approaches on either side at the grade of substantially five per cent. for a distance of 125 feet from the tracks. The railroad right-of-way at this crossing is 100 feet wide and is occupied by four main operating tracks and various railroad appurtenances including a freight and passenger station, milk platform, weighing scales and driveways.

The legal width of said Highway Route No. 16 at and in the vicinity of said crossing is 33 feet (Exhibit "K," R. 159, l. 29; 36, 201) and the traveled portion of said highway throughout its distance is an average of 20 feet wide, including an improved modern pavement 18 feet wide (R. 36). This highway was formerly a county road of the County of Somerset and was taken over by the State Highway Commission by resolution adopted April 20, 1920 (Exhibit "E," R. 130-135), pursuant to Section 3 of the State Highway System Act (Chap. 220, P. L. 1919, p. 511), and was created State Highway Route No. 16 (between Morristown, in Morris County, and Trenton in Mercer County) by an Act of the Legislature passed the same year (P. L. 1920, pp. 221, 222).

At a point about 1,400 feet easterly of the grade crossing of Highway Route No. 16 there is another road, known as Camp Lane Road, which branches off the Highway Route No. 16 at a point 1,220 feet north of the railroad tracks and runs in a southeasterly direction across said railroad at a practically level grade crossing (R. 36).

History of Proceedings.

Negotiations with Highway Commission.

Before the Board initiated its proceedings the appellant and the State Highway Commission, which has jurisdiction over Highway Route No. 16, the principal highway in question, conducted negotiations and reached an agreement as to all the details of a plan and a contract in writing under which the appellant was to perform the work of eliminating this crossing and bear $40,000 toward the cost thereof; the State Highway Commission paying the balance. Complete general and detailed plans were prepared and signed on behalf of both parties and the appellant began the work, expending thereon approximately $5,000 before the Board made its order of November 24, 1926, initiating the proceeding which culminated in the order complained of.

Proceedings Before the Board of Public Utility Commissioners.

The Board of Public Utility Commissioners of New Jersey, consisting of the three persons named as defendants (R. 22), was created by an Act of the Legislature entitled, "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911 (N. J. P. L. 1911, 374) and exercises certain powers described in said act and its several supplements and amendments.

The Board's authority to order the abolition of a grade crossing emanates solely from a supplement to said act of 1911, approved March 12, 1913 (N. J. P. L. 1913, p. 91) known as the "Fielder Act," printed in full as Appendix "B" of this brief.

Proceedings for the abolition of a crossing at grade may be instituted by petition in writing filed by the board

or body having charge of the finances of the municipality in which the crossing exists, or by the railroad company whose tracks are crossed at grade, or the Board may on its own motion institute such a proceeding.

By its order of November 24, 1926, the Board initiated a proceeding and called a hearing to determine whether the grade crossing in question should be eliminated by substituting a crossing not at the grade of such public highway under or over said railroad or by reconstructing such railroad under or over such public highway, or by vacating, relocating, or changing the lines, width, direction or location of such highway and the opening of a new highway in place of the one ordered vacated. (R. 118, 119).

After hearings, the Board, on April 26, 1927, made its order directing appellant to alter said crossing according to a plan prepared by the Board (Exhibit "A" opp. R. 116) at a cost to the appellant, estimated by the Board's Chief Engineer, of $318,400 (Exhibit "J," R. 156; R 188, 189), afterwards corrected to $324,400, to include detour (R. 44, 93, 124), exclusive of property damages. There being no street railway at the crossing, this entire expense is required by the statute to be paid by appellant. This plan calls for depressing the highway and raising the railroad tracks six inches (R. 188) on their present locations, respectively, and building a bridge to carry the railroad over the highway at an angle of 29° 30', with a twenty foot roadway on each side of a centre pier and additional space for two sidewalks, one on each side (R. 180). The plan also provides for closing a crossing on a highway known as Camp Lane, located 1,400 feet east of Route No. 16 (R. 36), and building a connecting road between the two highways for a distance of 1,940 feet along the southerly side of the railroad (R. 45, 179, 188).

Appellant objected to this plan and offered as a substitute a plan known as Plan "C" (R. 182), which had been

originally prepared and approved by the State Highway Commission (R. 136, 137, 138, 139) (Exhibit "C," R. 129), calling for a relocation of the highway to a point 400 feet east of the present crossing (R. 37), so as to provide a crossing of the railroad at an angle of 54 degrees (R. 183) with an eighteen-foot underpassage on each side of a centre pier and no sidewalk spaces and making no provision for the Camp Lane crossing. The appellant offered to enlarge that plan so as to eliminate Camp Lane crossing as in the Board's plan and to provide a highway undercrossing on Highway Route No. 16, of the same type and construction and having the same dimensions and roadways and sidewalk facilities as the plan proposed by the Board (R. 55, 189, 191, 212). By such relocation of the highway the angle of the crossing is changed from 29 degrees to 54 degrees and the width of the railroad bridge (and length of the underpassage) would be reduced 42 feet (R. 137, l. 18; 138, l. 32), or 47 feet (Wasser, R. 174, at bottom).

The cost is likewise reduced from $324,000, exclusive of property damage, to $205,184.70, including property damages (R. 44, 53, 93, Exhibit "1," R. 153, 155); a difference in cost between the two plans of approximately $120,000 (R. 44, 53). This plan the Board rejected, and ordered its own because the relocation of the highway proposed therein involved the introduction of six degree curves (R. 125, ll. 33-34). The physical differences between the two plans are graphically represented on the composite map annexed hereto as Appendix "C."

Proceedings in the New Jersey Supreme Court.

On May 14, 1927, appellant applied to one of the Justices of the New Jersey Supreme Court for a writ of certiorari (the only means available under the statutes of New Jersey) to review said order of the Board (R. 33). On May 17, 1927, that application was denied, without prejudice,

to a renewal of the application to the Supreme Court *en banc* (R. 33). See opinion 137 Atl. 433 (R. 98).

On May 23, 1927, appellant applied to the New Jersey Supreme Court *en banc* for a writ of certiorari to review said order (R. 33). On May 31, 1927, the Supreme Court denied the application (R. 34) (See 137 Atl. 923) and on June 6, 1927, entered its order accordingly (R. 102).

Proceedings in the District Court.

On June 1, 1927, the appellant filed its bill of complaint in the District Court under Section 266 of the Judical Code, praying for a preliminary injunction pending the return of an order to show cause, an interlocutory injunction pending suit, and a permanent injunction (R. 31) to restrain the enforcement of said order (R. 21-32).

On the filing of the bill an order to show cause was granted, including a preliminary injunction. On June 10, 1927, on the return of said order, a motion for an interlocutory injunction was argued before a statutory court, consisting of one Circuit Judge and two District Judges. On June 28, 1927, this motion was denied (Opinion, R. 13). On July 15, 1927, appellant filed a petition for rehearing (R. 104), which was denied in the interlocutory decree entered August 10, 1927.

The cause was brought on for final hearing, before the same court, on January 18, 1928, and the bill was dismissed, without further opinion (R. 1). On the same day an appeal was allowed, with a supersedeas (R. 3).

SPECIFICATION OF ERRORS.

The following assigned errors are intended to be urged:

First: Said court erred in dismissing the bill of complaint.

And in refusing to grant to the plaintiff a permanent injunction, in accordance with the prayer of its bill of complaint, restraining the defendants and each of them from enforcing the order of the Board of Public Utility Commissioners of the State of New Jersey made on April 26, 1927, directing the plaintiff to alter the crossing known as South Bridge street, or State Highway Route No. 16, by substituting therefor a crossing not at grade of the said public highway; and directing the plaintiff to close the crossing at Camp Lane and to construct a connecting highway therefrom to said State Highway Route No. 16, in the Township of Hillsborough, Somerset County, New Jersey (R. 4).

Second: Said court erred in holding that said order of said Board was not in violation of the Constitution of the United States, to wit, Article I, Section VIII, Paragraph 3, reading as follows:

> "The Congress shall have power • • •
> 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (R. 4).

And in not holding that the said order was in violation thereof (R. 5).

Third: Said court erred in holding that the said order of said Board was not in violation of the Constitution of the United States, to wit, Article I, Section X, Paragraph 1, reading in part as follows:

> "No state • • • shall pass any • • • law impairing the obligation of contracts."

And in not holding that the said order was in violation thereof (R. 5).

Fourth: Said court erred in holding that the said order of said Board was not in violation of the Constitution of the United States, to wit, Article VI, Section II, reading in part as follows:

> "This Constitution, and the laws of the United States, which shall be made in pursuance thereof; • • • shall be the supreme law of the land."

And in not holding that the said order was in violation thereof (R. 5).

Fifth: Said court erred in holding that said order of said Board was not in violation of the Constitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

And in not holding that the said order was in violation thereof (R. 5).

Sixth: Said court erred in holding that said order of said Board was not in violation of the Constitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

> "Nor shall any State • • • deny to any person within its jurisdiction the equal protection of the laws."

And in not holding that the said order was in violation thereof (R. 5).

Seventh: Said court erred in holding that the said order of said Board did not impose upon the plaintiff a necessity for unreasonable expenditures for structures and maintenance of way in conflict with certain provisions of the Act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (2), (3) and (4) of Section 422 thereof, now part of Section 15a of the Act to Regulate Commerce.

And in not holding that said order did impose upon the plaintiff a necessity for unreasonable expenditures

for structures and maintenance-of-way, in conflict with said paragraphs of said "Transportation Act, 1920" (R. 6).

Eighth: Said court erred in holding that the said order of said Board did not create, constitute or impose an unreasonable or arbitrary requirement or burden upon, interference with, impediment of or discrimination against, the interstate commerce of the plaintiff, and did not otherwise impair the usefulness of its facilities therefor, in conflict with certain provisions of the Act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (3) and (4) of Section 416 thereof, now part of Section 13 of the Act to Regulate Commerce.

And in not holding that said order did affect the interstate commerce of the plaintiff as aforesaid (R. 6).

Ninth: Said court erred in holding that the said order of said Board was not an unreasonable exercise of the police power and did not thereby deprive the plaintiff of its property without due process of law.

And in not holding that said order was an unreasonable exercise of the police power and did thereby deprive the plaintiff of its property without due process of law (R. 6).

Tenth: Said court erred in holding that the denial by the New Jersey Supreme Court of a review of said order of said Board did not deprive the plaintiff of its property without due process of law, in that thereby the plaintiff was refused a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order of said Board confiscates the plaintiff's property (R. 6).

And in not holding that said denial did deprive the plaintiff of such fair opportunity to submit said issue to

such judicial tribunal for determination, as aforesaid (R. 7).

Eleventh: Said court erred in holding that said order did not confiscate the property of the plaintiff for the benefit of other persons and did not deny to the plaintiff the equal protection of the laws.

And in not holding that said order did confiscate the property of the plaintiff and did deny the plaintiff the equal protection of the laws, as aforesaid (R. 7).

Twelfth: Said court erred in holding that said order did not impair the obligation of a contract between the plaintiff and the State of New Jersey, to wit, a contract made between the plaintiff and the State Highway Commission, acting for and on behalf of the State of New Jersey, for the elimination of the grade crossing known as South Bridge street, or State Highway Route No. 16, in the manner and according to the terms of the contract described in the bill of complaint and the affidavits and exhibits of the plaintiff.

And in not holding that said order did impair the obligation of said contract, as aforesaid (R. 7).

Thirteenth: Not urged.

Fourteenth: Said court erred in holding that the statute of the State of New Jersey, entitled "A supplement to an act entitled 'An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers' approved April twenty-first, one thousand nine hundred and eleven," approved March 12, 1913 (N. J. P. L. 1913, p. 91) and the act to which the same is a supplement (N. J. P. L. 1911, p. 374), as amended, under the authority of which said order was made, as construed by said New Jersey Supreme Court and by said District Court, did not violate the Constitu-

tion of the United States, to wit, Article I, Section VIII, paragraph 3, reading as follows:

> "The Congress shall have power • • •
> 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (R. 7).

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Fifteenth: Said court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article I, Section X, paragraph 1, reading in part as follows:

> "No State • • • shall pass any • • • law impairing the obligation of contracts."

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Sixteenth: Said court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article VI, Section II, reading in part as follows:

> "This Constitution, and the laws of the United States, which shall be made in pursuance thereof; • • • shall be the supreme law of the land."

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Seventeenth: Said court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Eighteenth: Said court erred in holding that said statutes, as so construed, did not violate the Con-

stitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

> "Nor shall any state • • • deny to any person within its jurisdiction the equal protection of the laws."

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Nineteenth: Said court erred in holding that said statutes, as so construed, did not impose upon the plaintiff a necessity for unreasonable expenditures for structures and maintenance-of-way in conflict with certain provisions of the act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (2), (3) and (4) of Section 422 thereof, now part of Section 15a of the act to regulate commerce.

And in not holding that said statutes, as so construed, were in conflict with said act, as aforesaid (R. 8, 9).

Twentieth: Said court erred in holding that said statutes, as so construed, did not create, constitute and impose an unreasonable and arbitrary requirement and burden upon, interference with, impediment of and discrimination against, the interstate commerce of the plaintiff, and otherwise impair the usefulness of its facilities therefor, in conflict with certain provisions of the Act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (3) and (4) of Section 416 thereof, now part of Section 13 of the act to regulate commerce.

And in not holding that said statutes, as so construed, were in conflict with said act, as aforesaid (R. 9).

Twenty first: Said court erred in holding that said statutes, as so construed, did not constitute an unreasonable exercise of the police power and thereby deprive the plaintiff of its property without due process of law.

And in not holding that said statutes did constitute an unreasonable exercise of the police power and did thereby

deprive the plaintiff of its property without due process of law, as aforesaid (R. 9).

Twenty-second: Said court erred in holding that said statutes, as so construed, did not confiscate the property of the plaintiff for the benefit of other persons, and deny to the plaintiff the equal protection of the laws.

And in not holding that said statutes, as so construed, did confiscate the property of the plaintiff and deny to the plaintiff the equal protection of the laws, as aforesaid (R. 9).

Twenty-third: Said court erred in holding that said statutes, as so construed, did not impair the obligation of a contract between the plaintiff and the State of New Jersey, to wit, a contract made between the plaintiff and the State Highway Commission, acting for and in behalf of the State of New Jersey, for the elimination of the grade crossing known as South Bridge street, or State Highway Route No. 16, in the manner and according to the terms of the contract described in the bill of complaint and the affidavits and exhibits of the plaintiff.

And in not holding that said statutes, as so construed, did impair the obligation of said contract, as aforesaid (R. 9, 10).

Twenty-fourth: Said court erred in holding that said statutes, as so construed, did not deprive the plaintiff of its property without due process of law, in that thereby the plaintiff was refused a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order of said Board confiscates the plaintiff's property.

And in not holding that said statutes, as so construed, did deprive the plaintiff of such fair opportunity to submit said issue to such judicial tribunal for determination, as aforesaid (R. 10).

SUMMARY OF ARGUMENT.

At the final hearing it was stipulated by counsel that the case should be submitted for final determination on the record at the hearing of the order to show cause, including the affidavits and exhibits filed with the Court by both parties on the application for interlocutory injunction (R. 169, *et seq.*).

It was further stipulated that there be included as a part of the record *in addition*, a condensed statement of the testimony of the witnesses who had testified before the Board of Public Utility Commissioners at the hearings before said Board on the proceedings therein instituted (R. 176).

We have prepared a summary of this testimony and of these affidavits which is printed as Appendix "A" to this brief and reference will be made to this summary in the argument of the legal questions which are now urged before this court without repeating same at length.

The following is a summary of the argument:

I.

The Order of the Board violates the Commerce Clause of the Constitution, and Sections 13 and 15a of the Act to Regulate Commerce.

Section 266 of the Judicial Code (Sec. 380 U. S. C.), under which this suit was brought, applies to the orders of an administrative board or commission of a state purporting to act under authority of a state statute, when the order is attacked as violative of the federal Constitution.

(a)

The order of the Board requires the appellant to make unreasonable expenditures for structures and maintenance.

Said order directs the appellant to eliminate, at its own expense, a grade crossing, in accordance with a plan, the cost of which is more than twice as much as the cost of another plan submitted by appellant, which would adequately serve all reasonable requirements of public safety and convenience.

The questions presented in this case are novel and have never been involved or considered in any previous decision of this court relating to the power of a state to require the elimination of railroad grade crossings.

The first question arises under the provisions of the Transportation Act, 1920, and the decisions of the courts and of the Interstate Commerce Commission relating thereto.

The history of the Transportation Act and the decisions of the Interstate Commerce Commission construing and interpreting the provisions thereof relating to the maintenance of way, structures and equipment, show that the purpose and the policy of said Act are to balance the cost of operation and maintenance against the rates fixed by the Commission, so as to enable the carriers to earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property held for and used in the service of transportation, as fixed by the statute and by the Commission. Such fair return is required by the statute to be based upon "honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment."

The record herein shows that the appellant has not yet been able, under the rates prescribed by the Commission, to realize the fair return fixed by the Commission.

The record shows that the estimated cost to the appellant of eliminating the crossing in the manner required by the order under review, is $324,400 (exclusive of property damage), as compared with an estimated cost of $145,024.47 (including cost of land and damages) of eliminating the crossing, in accordance with the plan proposed by the appellant, and as compared with an estimated cost of $205,184.07 (including cost of land and damages), in accordance with an enlargement of appellant's plan to provide the same number and width of roadways and sidewalk spaces as required by the Board's plan.

The record shows that the plan proposed by the appellant, either in its original form or as enlarged, is feasible and practicable for the elimination of the crossing and in accordance with standard practice, and that there was no substantial basis for the objections thereto.

The carriers have no right to make, and the states (or Boards or Commissions thereof) have no right to order, unreasonable expenditures for structures in the elimination of grade crossings; such expenditures must not exceed the legal duties of the carrier or the reasonable requirements of public safety and convenience.

(b)

The order imposes unreasonable burdens upon and discrimination against the interstate commerce of the appellant and impairs the usefulness of its facilities therefor.

The plan of the Board requires an extravagant expenditure of appellant's earnings, instead of conserving them for the purpose of furnishing adequate transportation facilities and necessary improvements within the limits of reasonable economy, and thereby impairs appellant's efficiency as an instrument of interstate commerce.

The principles of the rate cases apply to any other attempted "regulations" by the state.

The power of the state to require the elimination of dangerous grade crossings must be exercised with due regard to the efficiency of the carrier as an instrument of interstate commerce and must not exceed its legal duties or the requirements of public safety and convenience.

The record shows that the reasonable cost of eliminating the grade crossing in question would be, at the most, about $205,000.00, and the state therefore has no right to appropriate out of the interstate revenues of the appellant an excess of $120,000.00 or more for such purpose.

II.

The Order of the Board violates the Constitution by impairing the obligation of a contract previously made between the Appellant and the State Highway Commission for the alteration of the grade crossing in question.

This Court may determine all questions involved in the case, including questions of State law.

Discussion of the relative power and authority of the Board of Public Utility Commissioners and of the State Highway Commission.

The power of regulation of public utilities does not extend beyond the express terms of the legislative grant.

The statute of New Jersey authorizing the Board of Public Utility Commissioners to order the elimination of grade crossings, applies only to crossings upon highways that are under the jurisdiction and control of a municipality, and does not apply to a crossing on a State highway over which the Highway Commission has exclusive control.

The statutes of New Jersey creating the Highway Commission and the State Highway System, by their terms, and as construed by the State courts, give said Commission exclusive jurisdiction and control over the elimination of grade crossings on State highways.

The record shows that the appellant and the Highway Commission, prior to the institution of the proceedings in which the order under review was made, conducted negotiations and had consummated a contract for the elimination of the crossing in accordance with a plan proposed by the Commission and accepted by the appellant, under which the appellant agreed to contribute, and the Commission agreed to accept, the sum of $40,000 as appellant's share of the cost.

The record further shows that after said contract was made, the appellant, acting upon the faith thereof, prepared working and detail plans and performed certain preliminary work on the ground, according to said plan, and actually expended for such purposes approximately $5,000.

The authorities show that there was a complete and binding contract between the appellant and said Commission.

III.

The Order of the Board, and the statutes under which it was made, as construed by the Courts of New Jersey, violate the due process and equal protection clauses of the Constitution.

(a)

The order is an unreasonable exercise of the police power.

The police power of the State is not limitless, but must be exercised in a reasonable manner and the question

whether it has been so exercised is subject to judicial determination.

This case presents the question whether the police power has been exercised in a reasonable manner when the State orders the expenditure of an unreasonable amount for the elimination of a grade crossing when the record shows that reasonable requirements of public safety and convenience can be adequately met by the expenditure of a substantially less amount.

Said order is unreasonable and arbitrary in the following particulars:

1. It requires an unnecessarily expensive plan.

2. It requires an undererossing in excess of the legal width of the highway and in excess of the demands of public travel, and takes a substantial area of the land of the appellant therefor without compensation.

3. It requires the elimination of a grade crossing at Camp Lane, which is not fairly incidental or necessary to the elimination of the principal crossing.

In accordance with the principles established by the decisions of this Court, the appellant seeks to prevent the State from taking its property in excess of the cost of a reasonable plan for eliminating the crossing.

The imposition of expense upon the appellant in an amount which is greater than is reasonably required, violates the 14th Amendment.

(b)

The order confiscates appellant's property for the benefit of others.

The record shows that the elimination of the crossing in the manner required by the Board's order is for the sole

benefit of property owners and residents in the immediate vicinity of the crossing.

(c)

The order of the Board and the statutes under which it was made, as construed by the Courts of New Jersey, deprive the appellant of a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue of confiscation.

The statutes of New Jersey deny to the appellant a review of the order of the Board of Public Utility Commissioners as a matter of right.

Under these statutes, and the decisions of the Courts of the State of New Jersey, the only review of such an order is by writ of certiorari, issued by the Supreme Court, if and when allowed in the discretion of said Court, or a justice thereof.

The allowance or refusal of a writ of certiorari is discretionary and is not subject to review by any New Jersey Courts.

The Public Utilities Act limits the power of the State courts, on such review, to set aside an order (made within the jurisdiction of the Board) when there is *no* evidence to support reasonably the order.

In the present case the appellant was in fact denied any review whatever by the refusal of a justice of the Supreme Court, and of the Court itself, to allow a writ of certiorari.

The record brings this case within the principle of the decision of this Court in the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908.

Discussion of the statute of Pennsylvania under which that case arose and the decision of this Court relating thereto.

Discussion of the case of *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. Ed. 269, and of the statute of Connecticut therein involved, and comparison thereof with the New Jersey statute with reference to the right of review

Discussion of the penalties prescribed by the New Jersey statutes for violation of orders of the Board.

IV.

Discussion of the opinions below.

The opinions of the Board and of the Courts below were erroneous in law, and contrary to the facts disclosed by the record.

ARGUMENT.

I.

The Order of the Board violates the Commerce Clause (Art. I, Sec. VIII, Pgf. 3) of the Constitution, and Sections 13 and 15a of the Act to Regulate Commerce.

Under authority of the power to regulate commerce conferred by Article I, Section VIII, Paragraph 3, of the Constitution, Congress enacted the Act to Regulate Commerce (24 Stat. 379) and its various amendments, including the Transportation Act, 1920 (approved February 28, 1920, 41 Stat. 456), the provisions of which it is claimed by the appellant, are violated by the order of the Board.

Under Section 266 (§380 U. S. C.) the statutory court considers the validity of a state statute, or of an order made by an administrative board or commission acting under and pursuant to such state statute, when the statute or the order is attacked on the ground that the same is in violation of the Federal Constitution.

The section applies to orders made under state statutes, as well as to the statutes themselves (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 67 L. ed. 659; *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 67 L. ed. 853; *Louisville & N. R. Co.* v. *R. R. Com.*, 308 Fed. 35).

(a)

Said Order requires the Appellant to make unreasonable expenditures for structures and maintenance.

New Legal Questions.

The defendants relied below chiefly upon the case of *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556; 38 L. Ed. 269, and upon the case of *Erie R. R. Co.* v. *Board*, (254 U. S. 394; 65 L. Ed. 322 (wherein Chief Justice White

and Justice Van Deventer and Justice McRaynolds dissented), as having settled the law on the powers of the New Jersey Board of Public Utility Commissioners to order the elimination of grade crossings under the Fielder Act (Ch. 57, Laws 1913, p. 91). The *Bristol Case* was decided in 1894, and the *Erie Case* involved a state of facts and law existing in 1913. The Transportation Act, 1920, has since been enacted, with its new declaration of principles of public regulation of and financial support for the carriers, and its requirement for reasonable expenditures for structures and maintenance.

In this case we present no questions that were decided or considered in the *Bristol, Erie* or any other case. Our argument under this point is based upon the provisions of the Transportation Act, 1920, and the decisions of the courts and of the Interstate Commerce Commission interpreting, construing and enforcing the purposes and provisions of that act. In the *Los Angeles Station Case* (264 U. S. 331), the Court said:

> "We avoid any inquiry how far, if at all, the principle laid down in Erie R. Co. v. Public Utilities Comrs. (citations) is qualified by the provisions of the Transportation Act."

In *McAneny, et als.* v. *N. Y. Central R. Co.*, 238 N. Y. 122, the New York Court of Appeals set aside an order of the Transit Commission requiring the railroad company to abolish a grade crossing by constructing a viaduct, not only across the railroad, but also extending across an adjoining parkway. In discussing the increased cost occasioned by this extension of the viaduct, the Court said (p. 385):

> "When it comes to the question of state legislative power to impose great expense on interstate railroads without the action of the Interstate Commerce Commission, the position of the railroads would probably be materially strengthened by the recent decision of the Supreme Court of the United States in *Railroad Commission* v. *Southern Pacific*."

The Transportation Act, 1920.

By Section 400 of the Transportation Act, Section 1 of the Act to Regulate Commerce was amended to give the Interstate Commerce Commission complete control over carriers engaged in the transportation of passengers or property wholly by railroad in interstate commerce and provides, in paragraph (3) of that section, "The term 'railroad' as used in this act shall include all *bridges* • • • used by or operated in connection with any railroad, and also *all the road* in use by any common carrier operating a railroad, • • •, and also all switches, spurs, *tracks*, terminals and terminal facilities of every kind used or necessary in the transportation of persons or property designated herein, *including all freight depots, yards and grounds*, used or necessary in the transportation or delivery of any kind of property."

This gives the Interstate Commerce Commission jurisdiction and control of the appellant's railroad and appurtenances at the point in question in this suit, and of any bridge that might be constructed there.

Section 422 of the Transportation Act added to the Act to Regulate Commerce a new section known as Section 15a, paragraphs (2), (3) and (4) of which provide as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management *and reasonable expenditures for maintenance of way, structures and equipment*, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to

modify or adjust any particular rate which it may find to be unjust or unreasonable and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation; *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, insofar as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value."

The Decisions of the Interstate Commerce Commission.

The Interstate Commerce Commission instituted a proceeding known as "Ex parte 74" (58 I. C. C. 220), in which it divided the country into certain rates groups or territories (one of which, known as the "Eastern Group," embraces the railroad of the plaintiff), determined and established rates intended, "under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment," to earn an aggregate annual net railway operating income, as nearly as may be, of 6 per cent. ($5\frac{1}{2}$ per cent. plus one-half of 1 per cent.) specified in paragraph (3) of Section 15a.

Those rates continued until May 16, 1922 ("Reduced Rates, 1922," 68 I. C. C. 676), when the Commission decided what in its judgment would, in the future, be a fair return upon the aggregate property of the carriers.

In that decision the Commission said (p. 861):

> "It is obvious that large additions to capital must continually be made. Most of the capital will have to be acquired through the issuance of securities which must be sold in the markets of the world in competition with other classes of securities. Within the next few years the Government must provide for the refunding of some six billions of its indebtedness. The carriers must attract money by rates of return and stability of investment. While the return must not exceed a reasonable charge against the public served, it must be such as to obtain the needed new capital. It is necessary to determine and make public, as required by section 15a, a percentage of fair return."

At page 682 the Commission says:

> "In numerous cases cited, courts and regulating authorities of States have recognized that public utilities and railroads may be permitted individually to earn under reasonable rates at least six per cent. upon fair value. In some instances higher

rates of return have been approved. But we are here considering return upon 'the aggregate value of the railway property.'"

"The interstate commerce act in many provisions other than those quoted indicates that six per cent. may be regarded as a fair return. Paragraph (6) of section 15a provides for the disposition of net railway operating income in excess of six per cent. of the value of the property held for and used in the service of transportation."

After discussing all of the elements that had entered into the cost of railway operation and maintenance during the two years intervening between this decision and the previous one, and after discussing the various individual commodities, the rates upon some of which had been reduced in the meantime, the Commission concluded (p. 732):

"It is our duty to initiate such rates as will enable the carriers to earn as nearly as may be a fair return, qualified as provided in the act. In 1920 we authorized large increases in freight rates and passenger fares designed to produce the necessary revenues under the conditions then prevailing. There was then little doubt of the ability of industry to bear the increased charges. The situation has since changed. The country has been passing through a period of abundant supply and slack demand, in which prices at the source have fallen off sharply. High rates do not necessarily mean high revenues, for, if the public can not or will not ship in normal volume, less revenue may result than from lower rates.

Shippers almost unanimously contend, and many representatives of the carriers agree, that 'freight rates are too high and must come down.' This indicates that transportation charges have mounted to a point where they are impeding the free flow of commerce and thus tending to defeat the purpose for which they were established, that of producing revenues which would enable the carriers 'to provide the people of the United States with adequate transportation.'"

* * * * * *

Page 734:

"We are of opinion that a general reduction in the rate level, as substantial as the condition of the carriers will permit, will tend not only to lessen the transportation burden but also to equalize and stabilize the conditions under which commerce and industry are carried on, with consequent fuller assurance to the carriers of realizing the fair return contemplated by the law.

* * * * * *

After considering all the facts of record, *including the necessity of reasonable expenditures for additions and betterments*, we find and determine:

1. That on and after March 1, 1922, a fair return upon the aggregate value of the railway property of the carriers defined in section 15a of the interstate commerce act, determined as therein provided, will be 5.75 per cent. of such aggregate property value as a uniform percentage for all rate groups or territories designed by this commission.

* * * * * *

Page 735:

"3. That the freight rates and charges herein determined will enable the carriers in the respective rate groups, under honest, efficient, and economical management *and reasonable expenditures for maintenance of way, structures, and equipment*, to earn an aggregate annual net railway operating income equal, as nearly as may be, to a return of 5.75 per cent. upon the aggregate value, as taken for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation."

The purpose of the Interstate Commerce Commission in these decisions of 1920 and 1922 was to carry out the provisions of the Transportation Act in such a manner as to balance the cost of operating, maintaining and conducting the railroads against the rates fixed by the Commission so as to leave a margin for the railroad companies between disbursements and revenues equal to the amount of the

fair return fixed, first by the statute at an aggregate of 6 per cent., and then, by the Commission's decision of 1922 at 5¾ per cent.

The Purpose of the Act.

The broad and comprehensive purpose of the Transportation Act, 1920, was fully declared when the bill was before Congress (Senate Report No. 304, House Report No. 456).

The purpose to deal with transportation problems from the *national standpoint*—to treat the railroads as a whole rather than as unrelated systems—is also shown in the Senate report (p. 12):

> "Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce among the States and with foreign nations, that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities. The commerce of one community, in these days, is deeply involved in the commerce of every community in the land. All the railways we have, or substantially all, must be maintained; and, from time to time, they must be enlarged and additional facilities must be provided."

Similar statements of the purpose are to be found in the House Report (p. 5):

> "The increasing tendency of Congress *to exercise to the full the powers granted it under the commerce clause of the Constitution*, and the decision of the Supreme Court of the United States in the *Shreveport* and *Minnesota Rate* cases, indicate a gradual but certain diminution of State control."

On December 4, 1919, Senator Cummins addressed the Senate as committee of the whole regarding Section 407 of the Transportation Act (in part), as follows:

> "According to the decisions of the Supreme Court of the United States, and according to the views of every other tribunal in all the world of which I have ever heard, they have this general idea with regard to the regulation of public utilities: that is to say, *if a public utility is fairly constructed, if it is properly and efficiently managed*, it has a right under the Constitution to earn a fair return upon the investment, upon the value of the property which renders the service—not upon the value of the property as determined by a capitalization of its earnings under a given body of rates—but it has a constitutional right to earn, as against regulation, a fair return upon the value of the property—*that is, its investment—if it has been honestly constructed* and is efficiently operated. The Supreme Court of the United States has declared that doctrine over and over again. It is idle for us to attempt, even if we were to attempt, to escape the principle which the courts have laid down. *It is a just principle;* it is fair and honest; and I, for one, do not desire to escape it" (Congressional Record, V. 59, pp. 130-133).

Another portion of Senate Report reads as follows:

> "In this regard the bill attempts to accomplish three results:
>
> First. By prescribing a basis of return upon the value of the railway property, to give such assurance to investors as will incline them to look with favor upon railway securities; that is to say, by making a moderate return reasonably certain to establish credit for the carriers.
>
> Second. In making the return fairly certain to secure for the public a lower capital charge than would otherwise be necessary."

On February 23, 1920, Senator Robinson (Ark.), speaking on the conference report relative to Section 422 of the bill, said:

> "The Commission is directed to so modify or adjust rates that carriers as a whole or in such groups or territories as the Commission may designate, will, under honest, efficient, and economical management and *reasonable expenditures for maintenance of way, structures,* and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of the carriers, as a whole, or in such groups held and used in the service of transportation.
>
> The Commission is empowered and directed to determine and make public what percentage of such aggregate property value constitutes a fair return and this percentage is made uniform for all rate groups.
>
> In fixing this rate the Commission is directed to take into consideration, among other things, the transportation needs of the country and the necessity of enlarging facilities to meet the requirements of the public.
>
> *Honest and economical management and expenditures constitute an important and controlling consideration.*
>
> • • • • • • •
>
> The provision gives due consideration to *the necessity for honest and economical management.*
>
> It has the advantage of certainty. It inspires confidence in investors, makes probable necessary developments in our transportation system and safeguards the public against the dangers and losses likely to result from an inefficient and inadequately maintained transportation system.
>
> *It is one of the most effective and valuable provisions in this bill.* Stripped of confusion and the misrepresentation, it stands forth as an evidence of the willingness and ability of the Congress to enact necessary and practical legislation to assure the preservation of existing transportation facilities

and to make probable the development of additional facilities demanded in the public interest" (Congressional Record, V. 59, pp. 3329-3334).

The Policy of the Act.

The only reservation in the Act in favor of the exercise of the police power of the states is found in the proviso at the end of paragraph 17 of Section 402 of the Act, which limits the power of the states:

> "To require just and reasonable freight and passenger service *for intrastate business*, except so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

Twice in the Act, once in paragraph 2, and again in paragraph 7 of Section 422, the purpose is stated to provide "a fair return upon the aggregate value of the railway property of such carrier held for and used in the service of transportation," and in providing such a fair return, which is a duty imposed by the Act upon the Interstate Commerce Commission, that Commission is directed, in paragraph 3 of Section 422 (now par. 3 of Sec. 15a of the Act to Regulate Commerce), as follows:

> "In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (*under honest, efficient and economical management of existing transportation facilities*) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

Again, in paragraph 5 of the same section, the purpose is declared:

> "To establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation."

In paragraph 2 of Section 439 of the Transportation Act (now Sec. 20a of the Act Regulating Commerce) the Interstate Commerce Commission is authorized to make orders approving the issuance of securities if they find such issuance:

> "Is for some lawful object within its corporate business, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service."

The paragraphs of the Transportation Act quoted above require the Interstate Commerce Commission to—

> (a) Determine the aggregate value of the railway property of the carriers held for and used in the service of transportation;
>
> (b) Determine and make public what percentage of such value constitutes a fair return thereon; and
>
> (c) Establish rates so that the carriers will, under *honest, efficient* and *economical management* and *reasonable expenditures for maintenance of way, structures and equipment*, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon that value.

Paragraphs 6 to 9, inclusive, of Section 15a of the Act to Regulate Commerce (as amended by Sec. 422 of the Transportation Act) contain what is known as the "Recapture Clause" and provide for a division between the railroad companies and the Government of all earnings in excess of 6 per cent. This gives the Federal Government a potential financial interest in the prosperity of every railroad in the United States.

It will be observed that the fair return which the Commission is authorized to establish, is predicated upon certain essential conditions, namely:

> (a) "Honest, efficient and economical management."

(b) "Reasonable expenditures for maintenance of way, structures and equipment."

The latter condition is expressly mentioned in the Commission's order of 1922 ("Reduced Rates, 1922, 68 I. C. C. 676"). The rates therein fixed were decided upon

"After considering all the facts of record, *including the necessity of reasonable expenditures for additions and betterments*" (p. 734).

The Facts.

The testimony before the Board and the affidavits and exhibits filed in this case are summarized (with full record references), in Appendix "A." They show that:

The effect of Commission Order of 1922 upon the appellant, as shown by Exhibit "L" (R. 174-175), has been to yield to the appellant the following net railway operating return:

1923	2.62 per cent.
1924	4.42 per cent.
1925	4.83 per cent.
1926	5.15 per cent.
1927 (11 months)	3.67 per cent.

It appears from these figures that appellant has not yet been able, under the rates so prescribed, to realize what the Commission has determined is a fair return.

The plan adopted by the Board calls for the construction of a steel railway bridge 105 feet long and 134 feet wide, with a highway undercrossing, 66 feet wide, on the line of the present highway Route No. 16, at an angle of 29 degrees and 30 minutes across the railroad, raising the railroad tracks 6 inches, with steel girders extending above the top of the rails and providing two 20-foot roadways, and two sidewalks each having a clear width of 8 feet 6 inches. The legal width of the highway on each side of the railroad is 33 feet with a travelled portion 20

feet wide including an improved pavement 18 feet wide. The plan also called for the closing of Camp Lane Road, an unimportant highway located about 1,400 feet easterly of Route No. 16 crossing, and the construction of a connecting road, for a distance of 1,940 feet along southerly side of the railroad. The cost of this project as estimated by the Board's Chief Engineer is—

Undercrossing on Route No. 16	$307,950.00
Camp Lane connecting road	10,450.00
Providing detour	6,000.00
Total (exclusive of property damages)	$324,400.00

Plan "C," approved by the Highway Commission and offered by the appellant before the Board, proposed a relocation of Highway Route No. 16 from a point 950 feet south to a point 1,300 feet north of the railroad and the construction of a concrete slab top railroad bridge with a highway undercrossing 40 feet wide, across the railroad at an angle of 54 degrees, at a point 400 feet east of the present crossing, providing two 18-foot roadways and no sidewalks, and making no provision for closing or otherwise affecting the crossing at Camp Lane Road. The relocation of the highway would increase its length only 125 feet. Highway Route No. 16 crossing is in a farming community and there are no sidewalks on this highway on either side of the railroad.

The estimated cost of Plan "C" is $145,024.47 including the cost of land to be acquired for the relocated portion of the highway and damages to adjoining property.

During the hearings before the Board, the appellant, in order to avoid the great expense of the Board's plan, suggested a revision of its plan so as to provide an undercrossing 66 feet wide with two 20-foot roadways and two sidewalks each 9 feet wide, closing Camp Lane Road

crossing and providing a connecting roadway along the south side of the railroad.

Except for the relocation of the Highway Route No. 16, the appellant's Plan "C," as so revised, provides an undercrossing identical with that of the Board's plan in all particulars of width between abutments, width of roadways, sidewalks (except that its sidewalks will be 6 inches wider) and all other highway facilities, including the same provisions for closing Camp Lane crossing and connecting roadway.

The estimated cost of Plan "C" as so revised, is $205,184.70, including the cost of land to be acquired for relocating Route No. 16 and for the connecting roadway, and damages to adjoining property.

The difference in cost between the Board's plan and appellant's Plan "C," as revised, is $119,215.30 (or in round numbers $120,000), plus the cost of acquiring land for the 1,940 feet connecting road required by the Board's plan, and damages, if any, to adjacent property.

The difference in cost between the Board's plan and Plan "C," as *originally* presented by appellant (which had been approved and adopted by the State Highway Commission) is $179,375.53, exclusive of the cost of land and damages.

Considering, for the sake of argument under this point, only appellant's Plan "C" as revised so as to provide at the proposed location the same dimensions and width of roadways and sidewalks as is proposed by the Board's plan at the present location of Route No. 16 crossing, and the same treatment of Camp Lane crossing, *the only objection urged against the appellant's plan related to the 6 degree curves involved in the relocated roadway.*

No objections were made by the State Highway Commission which had already approved this relocation, and

originally designed and approved these precise curves. No objection was made by the Board's Chief Engineer.

While Mr. Wasser, the only other competent witness who testified in opposition to Plan "C," objected to the curves on general principles, he admitted that a 6-degree curve is "perfectly safe" and "an accessible curve for all conditions" (R. 195). He testified that the sharper angle of crossing of the Board's plan *would increase the total length of the undercrossing by about 47 feet* and would increase the cost of the structure.

Other witnesses, all residents of the community in which the crossing was located, objected to the relocation of the highway; some on account of the curves, but most of them because they feared the relocation would adversely affect the value of their property located along the present highway. The objectors preferred the retention of the present location of the crossing for their own private benefit. Their testimony consisted of the opinions of unqualified and unskilled persons, and was not supported by any competent evidence. It was inadmissible under the ordinary rules of evidence.

Telfer v. *Nor. R. Co.*, 30 N. J. L. 188, 193;
Seifred v. *P. R. R. Co.*, 55 Atl. Rep. 1061.

Opposed to this testimony stand the records of the State Highway Commission of New Jersey showing that Plan "C," with the proposed relocation of the highway and its 6-degree curves, was originally designed, prepared and signed by its own State Highway Engineer and repeatedly approved and defended by its own resolutions, which have never been altered or rescinded. There is also the testimony taken before the Board as well as the affidavits that were filed in this cause, on behalf of appellant, of its Chief Engineer and Engineer of Grade Crossings, the Chief Engineer of the New York Public Service Commission and Mr. Diehl, a practicing and consulting engi-

neer of Buffalo, all highly qualified by training and experience to give accurate, authentic and convincing testimony on the subject. Their qualifications are described and a summary of their testimony is given in Appendix "A"

Briefly stated, that testimony shows that Plan "C" is a perfectly feasible and practicable plan that will provide a safe, adequate and proper method for eliminating the grade crossing involved in a manner suitable to the locality and all the circumstances of the situation; that the proposed curvature will not obstruct the view on the highway, is inconsequential, entirely safe, unnoticeable to highway travellers, will not diminish or affect the safety, convenience or capacity of the highway, is entirely desirable from economic and other points of view, and is the accepted standard practice for constructing highway bridges over streams and over or under railroads in other places where similar conditions exist.

These witnesses recite numerous instances of the kind and give their reasons in detail. It is everywhere the practice to similarly relocate highways in grade crossing elimination work in order to provide crossings at less acute angles and thereby shorten the length of the underpass and reduce the cost of construction and maintenance. It is the practice of the Public Service Commission in New York State to make similar relocations if thereby they can save $20,000 or $30,000. Here such a relocation will save at least $120,000 without causing the slightest degree of danger or inconvenience to or diminution of highway traffic.

Decisions.

In *Galveston Electric Co.* v. *City of Galveston* (258 U. S. 388, 66 L. ed. 678), it was said:

> "The intent of Congress was to create a steady and reliable flow of money 'for enlarging such facilities in order to provide the people of the

United States with adequate transportation.' *A substantial reduction in the percentage of return might be unsettling in its effect, particularly in light of the fact that the return allowed in 1920 was not realized.* The fact that a utility may reach financial success only in time or not at all is a reason for allowing a liberal return on the money invested in the enterprise."

In the *Los Angeles Station* case (*Railroad Commission of California* v. *Southern Pacific Co.*, 264 U. S. 331, 68 L. ed. 713), this court affirmed a decision of the Supreme Court of California setting aside an order of the California Commission which required the construction of a union station for the several railroads involved in connection with the elimination of various grade crossings. The Court said:

"Our only question here is whether the power to direct a new union station, with its essential incidents, is committed exclusively to the Interstate Commerce Commission under the Act of 1920.

In Dayton-Goose Creek R. Co. *v.* United States, decided January 7, 1924 (263 U. S. 456, ante, 388, 33 A. L. R. 472, 44 Sup. Ct. Rep. 169), this court said of the Transportation Act:

'The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the (Interstate Commerce) Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and, by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged . . .'

> *The purpose of Congress to prevent interstate carriers from incurring expenses which will lessen their ability to perform well their interstate functions is further shown in Sec. 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of Sec. 20a.* This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds, or other evidence of indebtedness, *and forbids approval unless the commission shall find that their issue is for a lawful purpose*, is compatible with the public interest, *is appropriate and necessary to the discharge of its public duty as a common carrier, and will not impair its ability to perform that service.* This is, of course, in pari materia with the restriction of paragraph 21 of Sec. 402, to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties."

We think this is also in *pari materia* with paragraph (2) of section 15a requiring reasonable expenditures for structures, &c.

This decision declares the purpose of Congress in enacting the Transportation Act "to prevent interstate carriers from incurring expense which would lessen their ability to perform well their interstate functions."

In *Akron, C. & Y. R. Co. v. U. S.* (261 U. S. 184, 67 L. Ed. 604), the Supreme Court considered the provision of the Transportation Act relating to the division of rates (*New England Divisions Case*). At page 189, Justice Brandeis discusses "the new railroad policy" introduced into Federal legislation by the Transportation Act, 1920, and in the notes at the bottom of the page are enumerated the various expressions of "the new purpose" contained in that Act. Then he says:

> "And to attain it, new rights, new obligations, new machinery, were created. The new provisions took in a wide range. Prominent among them are

those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads, funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear.

• • • • • •

Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers" (pp. 190, 191).

In *Dayton-Goose Creek R. Co.* v. *U. S.* (263 U. S. 456), 68 L. ed. 388, this Court sustained the "recapture" paragraphs of Section 422 of the Transportation Act. After referring to the provisions of that act fixing rates so as to yield a fair return, and citing the cases of *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, and case of *A. C. & Y. R. Co.* v. *U. S.*, 261 U. S. 184, the Chief Justice said (p. 478):

> "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that, when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To

> regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety." (Citing cases.)

At p. 479 the opinion continues:

> "If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service."

In *Colorado v. U. S.* (271 U. S. 153, 70 L. ed. 878), this court considered a case in which the State of Colorado brought a suit to enjoin and set aside an order of the Interstate Commerce Commission granting a certificate of public convenience and necessity for the abandonment of a branch of the Colorado and Southern Railway Company, located wholly within the State of Colorado. That branch was built under a charter granted by the State of Colorado and the state contended that the Interstate Commerce Commission had no authority to order the abandonment of intrastate traffic on the branch, without the consent of the state. The opinion of this court delivered by Justice Brandeis holds (p. 162):

> "The extent and character of this service (intrastate) is subject to regulation by the state. The inherent power of a state to regulate intrastate traffic by requiring the railroad to operate every part of its line, like its power to order a particular service, is, of course, subject to the limitation that the order must not be unreasonable."

Regarding the state's contention that the Interstate Commerce Commission had no power to authorize the company to abandon intrastate traffic, the opinion says (pp. 162, 163):

> "The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18

20. The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discriminations. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss" (citing illustrative cases) * * * (p. 164).

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."

* * * * * * * *

Rates which will afford a fair return must balance income and outgo. The interest of the shippers requires honest, efficient and economical management and *reasonable expenditures for maintenance of way, structures* and equipment; otherwise either the fair return or reasonable rates is impossible and the wise plan of Section 15a becomes a nullity.

The constitutional guarantees may not be made to yield to mere convenience.

Schlesinger v. *Wisconsin*, 270 U. S. 230, 70 L. ed. 557;

Weaver v. *Palmer Bros.*, 270 U. S. 402, 415; 70 L. ed. 654, 658.

It is well settled that a state has no power to fetter the right to carry on the interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it.

Sioux Remedy Co. v. *Cope*, 235 U. S. 197, 201; 59 L. ed. 193, 196;

Michigan P. U. Com. v. *Duke*, 266 U. S. 570, 577; 69 L. ed. 445, 449.

The Board, under the guise of regulation, may not compel the use and operation of the company's property for public convenience without just compensation.

Banton v. *Beltline Ry. Corp.*, 268 U. S. 413, 420; 69 L. ed. 1020, 1025.

Sound business economy and the necessity of the lowest practicable rates supports the law in requiring in our case a *reasonable expenditure* (and no more) for the elimination of this under-crossing. If the Board's order requires an unnecessary width or length of under-pass, or unnecessary sidewalk spaces, or a substantial increase in the cost of the project by reason of maintaining present alignment of the highway when a relocation of the highway and a change of its alignment can be made without impairing the safety or convenience of the public, that order imposes upon the plaintiff an unreasnoable expenditure for this structure in violation of this provision of the law.

Giving weight to these considerations and to the principles laid down in the decisions with respect to rates, it

seems manifest that for the protection of the carriers as instruments of commerce, Congress has very properly exercised the right to limit the expenditures for improvements and structures to the reasonable requirements of the situation, in order to maintain the balance, in the interest of the shippers and public on the one hand and the carriers on the other hand, between rates fixed by the Commission (over which the carriers have no control) and the expenditures that the carriers may lawfully be required to make for improvements. Congress has controlled every element of income derived from railroad operation; wages and working conditions of employees, operating relations between carriers, rates, rental of joint or other facilities, the amount of bonded indebtedness, and the rates of interest thereon, the price at which securities may be sold, membership of boards of directors, hours of service, safety appliances, inspection, construction and distribution of cars, locomotives and equipment, extension and abandonment of railroad facilities, extent and character of transportation service, liability of employers for accidents to employees, the manner in which various commodities shall be handled,. and many other details, sufficient in extent to comprehend every phrase of railroad transportation. Having limited the income and directed the outgo, it would be a strange situation which left it open to the states to require the expenditure of millions of dollars in excess of reasonable requirements, for local improvements like grade crossings eliminations, which earn no revenue for the carrier, and benefit only the people in the localities affected and the competing local transportation agencies operating, free of cost, on the public highways improved by such expenditures.

The extent to which this practice might affect the plaintiff, is illustrated by the statement contained in the affidavit of the Chief Engineer of appellant (R. 57, 60), giving a schedule of grade crossings on its railroad in the

states of New York, New Jersey and Pennsylvania. This schedule contains a classification of crossings made by the public authorities, according to their danger to and impediment of highway travel. That schedule shows the potential inroads that might be made upon the plaintiff's operating income by the frequent exercise of the power of state commissions for the elimination of grade crossings according to plans in excess of the reasonable requirements of public safety and convenience.

In the three states named there are 1,297 crossings on the appellant's railroad. The estimated cost of eliminating these crossings, computed by the engineers of the Public Service Commission of the State of New York with respect to crossings in that state, and by applying the same average cost per crossing in each class in the three states, gives a total potential cost of $107,791,847. It is improbable that all of these crossings would ever be required to be eliminated, but is entirely probable that all of the 150 Class A crossings, and a large number of the 306 Class B crossings, might be required to be eliminated in the not distant future. The Class A crossings are estimated to cost (in round figures) $22,500,000, and the Class B crossings are estimated to cost (in round figures) $27,000,000. It is fair to assume that these average cost estimates, made by the authorities of New York State, where the public pays one-half of the cost, are reasonably conservative and in accordance with rules of economy described by Mr. Vanneman (Chief Engineer of the New York Public Service Commission) as being practiced in New York State (R. 65, 66, 70, 197, 200, 201). Excessive requirements like those imposed by the order of the Board in the present case, would add $11,250,000 to the Class A crossings and $13,500,000 on Class B crossings; or upwards of $24,000,000 to what the appellant might reasonably be required to spend for such purposes.

On this point it is interesting to note that the plan of elimination approved and adopted by the State Highway Commission at its meeting of March 11, 1924, was estimated by its engineers to cost $109,024 (of which the appellant was willing to pay $40,000). When objections were offered to this plan because of the relocated line and the 6-degree curves involved, the Commission resolved on April 22, 1924, to adhere to this plan "on account of the considerable saving that would be effected thereby, and the further fact that the curve involved was only a 6-degree curve which was not considered serious by the State Highway Commission," and also the fact that a much shorter underpass and speedier construction would be accomplished by means of the new line as adopted (R. 137). Again, after these objections had been renewed by the residents of the community, the Commission, on June 24, 1924, resolved to adhere to the original plan (Plan "C"), "not only from an engineer's standpoint, but because of a saving of money and because they (the plans) are already prepared" (R. 139). From these references to the State Highway Commission's minutes it appears that that body had due regard for reasonable expenditures for the construction of improvements of this character.

Since rates afford the only source of carrier revenues, every legitimate expense must be covered by them. The Interstate Commerce Commission has undertaken to provide rates that will provide "as nearly as may be" a net railway operating return of 5¾ per cent on the value of the carrier's property held for and used in the service of transportation, and no state or state body can legally destroy the result.

Unless the courts are to give due regard to the language of the Transportation Act limiting the expenditures for such improvements to reasonable amounts, the Interstate Commerce Commission must authorize higher rates for the transportation service, in which case the burden

will fall upon the shippers and passengers of the carriers, or these unreasonable expenditures will further diminish the return of the appellant below what the Commission has determined to be a fair return and, as a result, the purpose of Congress to provide efficient instrumentalities of commerce with an income sufficient to foster and preserve in full vigor the transportation service, and to attract money to provide constantly necessary enlargements of transportation facilities will be defeated.

It can no longer be contended that the power of Congress is not plenary and complete or that it lacks power to deal with the carriers both individually and collectively, or to impose requirements in the form of adequate rates, or by restricting unnecessary expenditures to the extent that is necessary to provide for a fair return upon the value of the whole property of the carriers held for and used in the transportation service. This power must necessarily extend to the regulation as well as to the rates imposed by state bodies; otherwise by their orders they can destroy or defeat the purpose of Congress and subject the carriers to unnecessary or excessive expenditures that would ultimately destroy the balance sought to be provided by the Transportation Act between revenues and expenditures.

The national and complete power of Congress is illustrated by the decision in *Wilson* v. *New*, 243 U. S. 332, 347 (p. 347), 61 L. ed. 755 (p. 778), where this Court said:

> "That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation *to the full extent necessary to secure and protect it*, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject."

In paragraph 3 of Section 15a of the Act to Regulate Commerce (as amended by Sec. 422 of the Transportation Act) the Commission was directed to "give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of *existing* transportation facilities)," of enlarging such facilities in order to provide the people of the United States with adequate transportation. And in Section 500 of the Transportation Act "it is hereby declared to be the policy of Congress to promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States, *and to foster and preserve in full vigor both water and rail transportation.*" All of the existing carriers were comprehended within the Act, whether they were great or small,

Mr. Justice Holmes, in his opinion in the *Paterson Grade Crossing Case*, 254 U. S. 394, at p. 411; 65 L. ed. 322 at p. 324, with respect to the financial burdens imposed upon the railroad company by the Board's order in that case, says:

> "If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. Brooks-Scanlon Co. *v.* R. R. Commission, 251 U. S. 396."

The Transportation Act declares a new policy in this respect as clearly indicated by Senate Report No. 304, which states (at p. 12):

> "All the railways we have, or substantially all, must be maintained, and, from time to time, they must be enlarged and additional facilities must be provided."

Paragraph (5) of Section 15a of the Act to Regulate Commerce (as amended by par. 3, Sec. 422 of the Transportation Act) provides as follows:

> "To establish uniform rates upon competitive traffic which will adequately sustain *all the carriers*

> which are engaged in such traffic *and which are indispensable to the communities to which they render the service of transportation.*"

Certainly it is not the policy of the Transportation Act to have any instrument of transportation stopped. That would not be the promotion, enlargement or development, or the fostering and preserving of rail transportation in full vigor.

The new policy is different. *All* rail transportation must be fostered and preserved in full vigor and enlarged.

Maintenance.

The Transportation Act requires reasonable expenditures, not only for original cost, but also for the maintenance of structures. If this bridge is built at an angle of 29 degrees according to the Board's plan, it will be 42 feet wider than if it were built at an angle of 54 degrees as proposed by Plan "C." Also, if it is built 66 feet long, as required by the Board's plan, instead of 40 feet long, as proposed by Plan "C," as approved by the Highway Commission (Exhibit "F," R. 145-150) it will be 26 feet longer. The Board's plan would, therefore, require more than 4,000 square feet of bridge structure in excess of that required by Plan "C." This additional 4,000 square feet of bridge must not only be built in the first instance, but forever maintained by the appellant. This increased length is particularly important because the cost of both construction and maintenance increases in the ratio of the square of the length, on account of the need not only of longer, but also of heavier, members as the length increases.

Hence we have an unreasonable expenditure for maintenance, as well as for construction.

(b)

Said Order imposes unreasonable or arbitrary requirements or burdens upon, interference with, impediment of or discrimination against the interstate and foreign commerce of the appellant, and impairs the usefulness of its facilities therefor.

The Board's plan is a wasteful extravagance of the appellant's earnings, which should be conserved for use in furnishing safe, adequate and proper transportation facilities and for improvements necessary within the limits of reasonable economy, for public safety and convenience (R. 58) and to avoid unnecessary stock increases.

Mr. Hand testified that:

> "If the Board's plan is carried out it will involve a reckless and useless waste of from $120,000 to $170,000 of money which will benefit nobody, and, to that extent, will prevent the plaintiff from providing safe, adequate and proper service and the making of reasonable expenditures for necessary public improvements" (R. 59).

Paragraph (4) of Section 13 of the Act to Regulate Commerce (as amended by Section 416 of the Transportation Act) provides as follows:

> "(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, *regulation*, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, *or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful*, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, *regulation*, or practice thereafter to be observed, in

such manner as, in its judgment, will remove such advantages, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, *the law of any State or the decision or order of any State authority to the contrary notwithstanding.*"

Commission Action.

After the Interstate Commerce Commission, by its decision in "Ex parte 74" (58 I. C. C. 220), had increased the rates to provide a fair return, in accordance with paragraphs (2), (3) and (4) of Section 15a of the Act to Regulate Commerce (as amended by Sec. 422 of the Transportation Act), a number of the states refused to approve these increases for intrastate rates. The Interstate Commerce Commission thereupon found it necessary to exercise its power under paragraphs (3) and (4) of Section 13 of the Act to Regulate Commerce (as amended by Sec. 416 of the Transportation Act) and conduct an investigation of intrastate rates.

After such an investigation the Commission found that the lower intrastate rates in a number of states created a discrimination against interstate commerce and exercised its authority by applying the interstate rates to intrastate commerce (*New York* case, reported in 59 I. C. C. 290). This action was resisted by a large number of states as an invasion of states' rights in the exercise of their police power. In some instances suits were brought in the state courts, either by the railroad companies to restrain the enforcement of the intrastate rates, or by the states to restrain the railroad companies from adopting the interstate rates. In other instances suits were brought in the federal courts (as in the *Wisconsin Rate Case*) by the railroad company to enjoin the interstate rates, and in other instances (like the *New York* case) the state filed a

bill in equity to restrain the enforcement of the interstate rates. While there were several of these cases before this court on appeal, either from state or federal courts, the merits of the controversy were disposed of by the decision in the *Wisconsin* case.

Decisions.

In *Railroad Commission of Wisconsin* v. *C. B. & Q. R. Co.* (257 U. S. 563, 66 L. ed. 371) and *State of New York* v. *United States* (257 U. S. 591, 66 L. ed. 385), this Court held that state regulations requiring intrastate rates lower than the interstate rates between the same points on competing lines were unlawful under this section because they discriminated against interstate commerce.

It was shown in the *Wisconsin Rate Case*, only about 20 per cent. of the carriers' freight business is intrastate commerce. This proportion applies equally to the railroad of the plaintiff. If it is to have its fair return, the money to pay for such improvements as the one in question must come largely from interstate commerce, and if the plaintiff can be required to spend from $120,000 to $175,000 for the elimination of this crossing, in excess of the reasonable requirements, and if the same can be required of it in any number of cases in New Jersey and elsewhere, it is obvious that the shippers from all parts of the country must contribute toward the payment of an excessive expenditure for the elimination of a grade crossing at Royce Valley in conformity with the preference of local residents and for the convenience of private travel on Highway Route No. 16, since the rates must be sufficiently high to yield a fair return on the aggregate value of property devoted to transportation service, and the Interstate Commerce Commission must boost interstate rates to accomplish the purpose of the Transportation Act.

The Chief Justice said in the *Wisconsin* case, that the plaintiff must have "a reasonably compensatory return *for all the work* it does."

At the time the *Paterson Grade Crossing* case arose there was no law forbidding discrimination against interstate commerce. That was an innovation introduced in Section 13 of the Act to Regulate Commerce by Section 416 of the Transportation Act and forbid—

> "any undue, unreasonable or unjust discrimination against interstate or foreign commerce *which is hereby forbidden and declared to be unlawful.*"

So this, too, is a point that was not and could not have been raised under the law as it stood at that time. The above-quoted prohibition applies not only to rates, but also to any "*regulation, or practice*, made or imposed by authority of any state." Certainly an order for the elimination of grade crossings is a "regulation" of the carrier in any acceptance of the term.

We contend that the principle declared and established by this Court in the rate cases applies equally to any other "regulation" by a state or state authority. This order of the Board of Public Utility Commissioners, by unnecessarily adding from $120,000 to $175,000 to the reasonable cost of this structure, creates an undue and unreasonable prejudice and an unjust discrimination against and burden upon the interstate and foreign commerce of the appellant.

It is not a sufficient answer to this contention to say that the amount in this individual instance is relatively small. The principle is the same regardless of amount, if, as in this case, the amount is substantial. If such an order can be lawfully made in one instance, it can as well be lawfully made in a hundred or a thousand instances. The wrong is not only in the amount involved in this case, but also in the potential effect of such

orders and their possible multiplication. It is not even necessary that this order shall actually increase rates or impair the fair return. It is equally bad if such is the tendency of this order.

Applying the principle of the Wisconsin decision to our case, if the plaintiff is to earn a fixed net percentage of income, the more of that income that is taken away from it, beyond the reasonable requirements of public convenience and necessity, the higher the (intrastate as well as) interstate rates may have to be. Herein lies the prejudice and discrimination against interstate commerce which, by the Act as above quoted, "*is hereby forbidden and declared to be unlawful, • • • the law of any State or the decision or order of any State authority to the contrary notwithstanding.*"

It is not necessary in this case to argue that a state may not require the elimination of a dangerous grade crossing. It is sufficient to urge that such authority be exercised with due regard to the requirements of reasonable expenditures. If the duty of appellant and the reasonable requirements of public safety and convenience will be adequately fulfilled by the adoption of Plan "C" as enlarged at a cost of $205,000, the state has no right to require the Board's plan at a cost of $324,400.

For these reasons it is respectfully submitted that the order of the Board violates the Commerce Clause of the Constitution and the Act to Regulate Commerce, by requiring the appellant to make unreasonable expenditures for structures and maintenance and by constituting a regulation of its interstate commerce amounting to an undue, unreasonable and unjust discrimination against the same by imposing thereon unreasonable and arbitrary requirements and burdens.

II.

The Order of the Board violates the Constitution by impairing the obligation of the contract previously made between the Appellant and the State Highway Commission for the alteration of the grade crossing in question.

The jurisdiction of the District Court, and of this court on appeal, extends to the determination of all questions involved in the case, including questions of State law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all.

> *Green* v. *Louisville & Interurban R. R. Co., Green* v. *Louisville Railway Co.*, 244 U. S. 499, 508; 61 L. Ed. 1280, 1286;
>
> *Louisiana P. S. Com.* v. *Morgans L. & T. R. & S. S. Co.*, 264 U. S. 393; 68 L. Ed. 756, 757;
>
> *A. C. L. R. R. Co.* v. *Daughton*, 262 U. S. 413, 416; 67 L. Ed. 1051, 1058;
>
> *Towne* v. *Eisner*, 245 U. S. 418, 426; 62 L. Ed. 372, 376;
>
> *Moy* v. *U. S.*, 254 U. S. 189, 191; 65 L. Ed. 214, 217;
>
> *C. G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 97; 69 L. Ed. 183, 188.

The first consideration under this point is the relative power and authority of the Board of Public Utility Commissioners and of the State Highway Commission.

Authority of the Board.

It is well settled that when bodies are created for the regulation of utility companies the presumption is that the power of regulation conferred does not extend beyond the express terms of the legislative grant.

> *Passaic, &c. Water Co.* v. *Board*, 139 Atl. Rep. 324 (N. J. Sup. Ct.), affirmed by the N. J. Court of Er. & Ap., 41 Atl. Rep. 921;

N. Y. S. & W. v. *Board*, 90 N. J. L. 432 (N. J. Sup. Ct.), affirmed by N. J. Court of E. & A. in 91 N. J. L. 701);

87 N.J.L. 128

P. S. Elec. Co. v. *Board*, ~~95 Atl. Rep. 707~~ (N. J. Sup. Ct.), affirmed by N. J. Ct. E. & App., 88 N. J. L. 603;

Potter v. *Board*, 89 N. J. L. 157 (N. J. Sup. Ct.).

The Fielder Act (which is printed in full in Appendix "B") applies only to crossings upon highways under the jurisdiction and control of a municipality.

Section 3 provides that

> "The expense of removing, relaying or relocating any municipal water or sewer pipes, or other municipal pipes, conduits or subways, shall be borne by the municipality owning the same and also the expense of paving, curbing and flagging the highway constructed as the result of the change of grade."

For this reason Section 5 provides that a petition, on behalf of a municipality, shall be presented by "the board or body having charge of the finances of any *municipality* wherein *such crossing* exists."

In *Curtis & Hill Co.* v. *State Highway Commission* (91 N. J. E. 421) the New Jersey Court of Chancery expressly held that the New Jersey State Highway Commission is *not* a "municipality."

There is no provision in the Fielder Act pertaining or appropriate to a crossing on a state highway over which the State Highway Commission has exclusive control. It would be an unwarranted stretching of the act to hold that it authorized a municipality to present a petition for the elimination of a state highway crossing over which it had no jurisdiction or control, or to hold that the act gave the Board authority to assume jurisdiction on its own initiative over a crossing on a state highway and thereby usurp

control of a subject which the legislature has placed in the exclusive control of a department of the state itself.

The act does not authorize the State Highway Commission to petition the Board for the elimination of a crossing on a state highway, nor did the legislature confer such power upon the Highway Commission in the Highway Department or Highway System Acts. In those acts the legislature conferred such powers for the elimination of grade crossings as it deemed proper. It is significant that during the ten years that have elapsed since the creation of the present State Highway System and the State Highway Commission the Board has not heretofore assumed such jurisdiction, nor has the State Highway Commission found it necessary to apply to the legislature for greater authority over grade crossing eliminations than were conferred in the first enactment of the State Highway Acts.

If it had been the intention of the legislature to make the Fielder Act applicable to crossings on county or state highways it would have used language appropriate and adequate for the purpose, both of which classes of highways existed when the Fielder Act was passed.

That the legislature never intended to give the Board jurisdiction to order the elimination of crossings on state highways, is shown by the fact that it has never amended the Fielder Act to include such authority, and it did not include such authority in the State Highway Department Act or the State Highway Commission Act, either in their original enactments or in any of the numerous amendments subsequently enacted.

On the contrary, the State Highway statutes cited *infra*, gave the State Highway Commission, by express terms, exclusive jurisdiction and control over the elimination of grade crossings on state highways.

Authority of the State Highway Commission.

The State Highway Commission possessed full power and authority to enter into an agreement with the appellant.

An act of the legislature of New Jersey entitled "An Act to establish a State Highway Department and to define its powers and duties; vesting therein all the powers and duties now devolved by law, upon the Commissioners of the Public Roads, and the existing State Highway Commission and Highway Commission," approved March 13, 1917. (N. J. P. L., 1917, p. 35), created and established a State Highway Commission consisting of four members, with power to elect a State Highway Engineer and other officers and providing, other things, as follows:

> Sec. 1. "A State Highway Department is hereby established and the same shall be governed by a board to be known as the State Highway Commission, * * *" (2 Cum. Supp. 3088).
>
> Sec. 8. "The State Highway Department shall succeed to and exercise all the powers and perform all the duties now exercised or performed by or conferred and charged upon the State Commissioner of Public Roads or upon the existing State Highway Commission, by virtue of any existing law or laws, *and shall have full control and direction of all projects and work on State highways*" (2 Cum. Supp. 3090).
>
> Sec. 10. "The work of the department shall be performed under the State Highway Commission *which shall have all power necessary therefor*, without recital in detail. *All action shall be determined by the State Highway Commission by the vote of a majority thereof*" (2 Cum. Supp. 3091).
>
> Sec. 12. (As amended by Chapter 204, P. L. 1923, p. 521) provides: "In addition to and not in limitation of its general powers, the State Highway Commission shall have power:
>
> a. To determine and adopt rules, regulations and specifications and to enter into contract cover-

ing all matters and things incident to the acquisition, construction, reconstruction, maintenance and repair of state highways.

b. To execute and perform as an independent contractor, or through contracts made in the name of the State of New Jersey, all manner of work incident to the maintenance and repair of state highways.

* * * * * * * * *

e. To construct, build, improve, widen, straighten and regrade any state highway and for such purpose and for any use incident thereto, or connected therewith, to acquire any lands, bridges or approaches thereto, and rights therein by gift, devise, purchase or by condemnation * * *" (2 Cum. Supp. 3091).

"*To do and perform whatever may be necessary or desirable to effectuate the object and purposes of this act.* To do and perform all acts now required by law to be done and performed by the State Commissioner of Public Roads, the State Highway Commission or the Highway Commission. *The powers are to be liberally construed*" (2 Cum. Supp. 3091, 3092).

The State Highway System over which this act gives the State Highway Commission "full control and direction," was established by an act of the legislature entitled "An Act to establish a State Highway System, and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof," approved March 13, 1917 (N. J. P. L., 1917, p. 25), which provides among other things, as follows:

Section 1, (as amended by Chapter 104, approved April 6, 1920, P. L., 1920, p. 221):

"1. The State Highway Commission shall, as soon as practicable, lay out routes for a State Highway System as follows: (2 Cum. Supp. 3074).

* * * * * * * * *

Route No. 16. From Morristown to Trenton by way of Van Dorn's Mills, Bernardsville, Far Hills,

Bedminister, Pluckemin, Somerville, South Somerville, Belle Mead and Harlingen" (2 Cum. Sup. 3075, 3076).

* * * * * * * * *

"Existing highways may be made use of wherever it is convenient so to do, but the commission may lay out, open and improve new roads over acquired rights of way and may also lay out routes in continuation of conecting with, or in addition to the routes above specified" (2 Cum. Supp. 3077).

Section 3 (as amended by Chapter 220 of the Laws of 1919, approved April 15, 1919, P. L., p. 511) provides:

"3. When, in its discretion, it shall see fit so to do, the State Highway Commission shall * * * determine by resolution whether any routes, route or parts thereof, if any, shall be taken over as a State Highway, and shall notify such governing body of such action. Upon the passage of such resolution, such routes, route, or parts thereof, shall become a State Highway, and its further improvement, maintenance and repair shall be at the expense of the State under the jurisdiction of the State Highway Department" (2 Cum. Supp. 3077).

Pursuant to this authority the State Highway Commission, on April 12, 1920, passed a resolution to take over from the County of Somerset, that portion of State Highway Route No. 16, lying within the limits of said county (R. 134). On August 3, 1920, a notice was sent by the State Highway Commission to the Board of Chosen Freeholders of Somerset County of its resolution to do so (R. 130). The portion described as the "Second Parcel" (R. 132) embraces the railroad grade crossing in Hillsborough Township involved in this suit.

Section 6 of the act (as amended by Chapter 220, Laws of 1919, p. 511, 512 *supra*) provides:

"6 * * *. All * * * railroad grade crossings shall be eliminated wherever practicable."

"7. The State Highway Commission shall take charge of all work on State Highways and main-

tain the same in good order. *All work of improvement, betterment, reconstruction* or resurfacing *shall be done in accordance with plans* and specifications *prepared by the State Highway Department* * * *" (2 Cum. Supp. 3079).

Section 10, provides:

"In the construction, repair and maintenance of Highways forming a part of the State Highway System, the said Commission shall possess and exercise in addition to those conferred by this act, all those rights and powers not incompatible with its functions nor prohibited by law which are now exercised by overseers of roads and Boards of Chosen Freeholders in road construction, repair and maintenance" (2 Cum. Supp. 3080).

Once before, in January, 1923, the Board had undertaken to order the elimination of the grade crossing at Route No. 16, but as soon as that information was brought to the attention of the State Highway Commission, it asserted the authority of its own exclusive control over the highway and authorized its Engineering Department to negotiate an agreement with the appellant for its elimination. That was the initiation of the negotiations which resulted in the agreement which appellant claims was consummated. The Board did not undertake to pursue its order but yielded to the authority of the State Highway Commission, at least until November 24, 1926, when it made another order instituting the proceedings in which the present order was made (R. 135, 136).

Acting under the authority of these statutes the State Highway Commission, on January 10, 1923, adopted a resolution directing its Engineering Department to open negotiations with appellant looking toward the elimination of this crossing (R. 135). These negotiations continued until March 11, 1924, when the State Highway Engineer presented for the consideration of the Commission alternate schemes and recommended the adoption of Plan "C"

at a total cost of $109,024.00, involving a structure with a center pier in the highway, leaving 18′ of roadway on each side of the pier, the appellant to share in the cost of this improvement to the extent of $40,000.00. Thereupon, by motion duly carried, the State Highway Commission approved Plan "C" and directed that the elimination of this crossing be proceeded with and that $40,000.00 be accepted from appellant as its proportionate share of the cost (R. 136).

Section 11 of the State Highway System Act provides:

> "It shall be lawful for the State Highway Commission to enter into written agreement with * * * any person or corporation for co-operation in any work, and to assume any portion of that cost" (2 Cum. Supp. 3080).

Section 19 of the same Act defines "Work" as follows:

> "WORK: The acquisition of land for any purpose connected with highways by lease, gift, purchase, demise, or condemnation, for temporary or permanent use; the laying out, opening, construction, improvement, repair and maintenance of highways; the building, repair and operation of bridges; * * * *the elimination of grade crossings,* * * * and all other things and services necessary or convenient for the performance of duties imposed by this act" (2 Cum. Supp. 3084).

These acts were all passed subsequent to the enactment of the Public Utilities Act and Fielder Act and confer upon the State Highway Commission *full control and direction of all projects and work of state highways,* including (expressly) the elimination of grade crossings.

Decisions under the Highway Acts.

The nature and extent of the powers and duties of the State Highway Commission by virtue of the statutes relating thereto, have been defined and discussed in the following cases in the New Jersey courts:

Curtis & Hill Co. v. *State Highway Commission*, 91 N. J. Eq. 421, 111 Atl. 16;

Haycock v. *Jannarone*, 99 N. J. L. 185, 122 Atl. 805;

Goodavage v. *State Highway Commission*, 96 N. J. Eq. 424; 125 Atl. 919;

Everett W. Cox Co. v. *State Highway Commission*, 133 Atl. 419;

Taylor-White Extracting Co. v. *State Highway Commission*, 136 Atl. 183;

State Highway Commission v. *City of Elizabeth*, 140 Atl. 335;

Roman Catholic Diocese of Newark v. *McGovern*, 142 Atl. 349.

In the *Curtis & Hill Co.* case a bill of complaint was filed in the Court of Chancery of New Jersey under the municipal Mechanics' Lien Law for the purpose of enforcing an alleged lien by a sub-contractor on moneys due from the Commission to a contractor who had the contract for constructing the highway. The question was whether the State Highway Commission was a "municipality." The Court of Chancery held that it was not, saying:

> "That the state highway commission is an alter ego of the state, and not a mere subordinate, is so clear as to need little discussion. The statute (P. L. 1917, p. 35, sec. 1) creates a state highway department, to 'be governed by a board to be known as the state highway commission.' The members of the commission are the Governor himself, ex officio, and eight members appointed by the Governor by and with the advice and consent of the Senate.

> The contracts made by the commission are clearly contracts of the state; they may be made either in the name of the state or of the commission. The funds expended for its work are the funds of the state, and expended through the usual state channels. The work which it is to do is the construction and maintenance of a state highway system, reaching throughout the entire state and for the benefit of all the citizens, *not merely in or for the benefit of any particular locality or the citizens thereof.* The work done under its contracts by these laborers and materialmen is work done 'in the state,' and not in any 'municipality in the state,' notwithstanding that each particular piece of work must necessarily have a locus within the geographical limits of one or more municipalities or the territory governed thereby."

In the *Everett W. Cox Case* the New Jersey Supreme Court said:

> "The state highway commission is given power 'to do and perform whatever may be necessary or desirable to effectuate the object and purpose of the act.' It further provides that these powers are to be liberally construed. • • • This act further provided that the work of the department shall be performed under the state highway commission, which shall have all power necessary therefor without recital in detail.
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> • • • • • • • • •
>
> The state highway commission can build any kind of a thoroughfare it desires."

In the *Elizabeth Case* injunction was sought by the Commission to restrain the city from interfering with the construction of Route No. 25 through the city and from interfering with entry upon lands owned by the city which were required for the highway. After the Commission had begun the work of constructing the highway its employees were arrested, the work was stopped and the bill was then filed for injunction. The principal claim of the city was that the Commission had no power to condemn

lands of a municipal corporation which were already in use for public purposes—at least in the absence of express legislative authority or necessary implication therefrom.

The city's claim was overruled and injunction was allowed. The Court, after quoting the statute and referring to the *Curtis & Hull Co. Case, (supra)*, said:

> "Therefore, when the State of New Jersey through its Legislature says that the state highway commission shall have power 'to do and perform whatever may be necessary or desirable to effectuate the object and purposes' of the act of its creation, it is but another way of saying: 'You are our agent and representative; and we invest you with all of our powers in furtherance of the objects and purposes for which you are created and this declaration of authority shall be liberally construed.' What more could be asked? By what language could broader powers be given? Under these terms the state highway commission might well say, in the words of a famous French monarch, 'L' Etat c'est moi.' The state highway commission is not a separate and distinct entity upon which the power of eminent domain has been referred, but it is to all intents and purposes, and within the scope of its authority, the state itself; and its powers within the sphere of its activities are limited only by the powers of the state."

In the *Diocese of Newark Case* the New Jersey Supreme Court, after referring to the statutory provisions, held:

> "This provision contains the necessary 'special permission' required by the Cemetery Act, but is also equivalent to a mandate to the commission to pursue such course as may be necessary for the practical and economic execution of the legislative purpose."

These decisions clearly indicate that the Courts of New Jersey consider that the legislation relating to the construction of State Highway routes supersedes all prior legislation which is in any way in conflict with the highway statute, and confers upon the State Highway Commission,

exclusively, all of the sovereign's powers relating thereto, including the elimination of grade crossings thereon.

On March 13, 1924, the State Highway Engineer advised the Chief Engineer of appellant of the State Highway Commission's resolution to proceed with the work of eliminating said grade crossing on the basis therein provided, in accordance with Plan "C," and asked appellant to draft an agreement in writing for that purpose. Appellant thereupon prepared a complete set of detailed plans for the relocation and reconstruction of said crossing in accordance with Plan "C" and incurred therein an expense of approximately $2,800 (R. 38).

On April 22, 1924, the Commission considered an objection from the Somerset County Board of Freeholders to the relocation of the highway, under Plan "C," and thereafter resolved "that the Somerset County Board of Freeholders be advised that *the action in adopting this new line had already been taken by the Commission* on account of the considerable saving that would be affected thereby, and the further fact that the curve involved was only a six degree curve, which is not considered serious by the State Highway Commission, and also the fact that a much shorter under-pass and speedier construction would be accomplished by means of the new line as adopted" (R. 137).

On June 18, 1924, the Commission received a report from Commissioner Jelin on a hearing held June 11, 1924, to consider local objections to the relocation of the highway. He stated that protests were made against the proposed alignment of Plan "C"; that a feeling was expressed that the Railroad Company was to be benefited by that plan; that he corrected this impression by advising that the Railroad Company was to contribute $40,000 toward the improvement; that he also explained to the residents that if a straight line was adopted for the route

there would be an additional 42 feet of covered roadway over that proposed; that it was pointed out that there are other points on this route where the curvature is 6 degrees or more; that the residents and Freeholders recommended that the crossing should be straight "even though there was involved in this case an expenditure of $40,000.00 by the State" (R. 138).

On June 24, 1924, after a discussion of these objections, Commissioner Stewart stated that public hearings had been held, and "no additional facts not already before the State Highway Engineer or State Highway Department were produced which would lead the Highway Commission to alter its opinion in regard to the advisability of the change as contemplated in the original plans." It was thereupon resolved "that the plan as drawn, not only from an engineer's standpoint, but because of a saving of money and because they are already prepared, be proceeded with and a copy of the action of this meeting be forwarded to Senator Case," who represented the objectors (R. 139).

On June 25, 1924, the State Highway Commission approved Plan "C," after flattening the highway curves, to 6 degrees, and sent the plan of alignment and profile of approaches to appellant who immediately accepted and adopted it (R. 38).

This plan without the detail drawings was offered by appellant before the Board as "Exhibit R R 1" and appears in this case as "Exhibit C" (R. 129).

On October 14, 1924, the Chief Engineer of appellant sent to the State Highway Engineer a draft of agreement covering the proposed elimination in accordance with Plan "C," with the curves flattened as requested. On October 17, 1924, complete detailed and general plans were forwarded by appellant to the State Highway Engineer for his approval and on November 11, 1924,

he sent to the State Highway Engineer for approval the official blue prints of the plan, dated November 8, 1924, duly approved and executed on behalf of the appellant and signed by George T. Hand, its Chief Engineer, and F. A. Schall, its Bridge Engineer (R. 39).

The State Highway Commission suggested certain minor changes in the draft of agreement submitted by appellant on October 14, 1924. These changes were accepted by appellant and on December 12, 1924, the plans were approved and adopted on behalf of the State Highway Commission and signed by W. G. Sloan, State Highway Engineer, and John A. Vogel, Bridge Engineer (R. 39). Blue prints of these plans were offered in evidence in this case as Exhibit "F" (R. 145-150). In order to expedite the progress of the work, appellant, pending these negotiations, proceeded to take up and relay cross-over tracks and do other preliminary work on the ground, at an actual expenditure of $2,194.13 (R. 38, 39).

Yielding to the influence of the objectors to Plan "C," the Commission, at a meeting held March 24, 1925, adopted a motion that the State Highway Engineer be instructed to make application to the Public Utility Commission for an order requiring the plaintiff to eliminate the crossing (R. 143). There was no suggestion or recommendation as to plans to be presented to the Board of Public Utility Commissioners and no action was ever taken changing the plan recommended by the State Highway Engineer and adopted by the Commission on March 11, 1924, and signed December 12, 1924. No action was taken to change or rescind the agreement theretofore approved by the State Highway Commission and no record appears of any application to the Board. Appellant was not advised of this action and it was not until June 1, 1925, that appellant received any advice or notice from the State Highway Commission that it would refrain from signing the formal written agreement for this work (p. 39).

Under Section 12 of the State Highway Department Act (*supra*) the State Highway Commission was empowered to enter into that agreement and bind the State of New Jersey, and this power, according to the language of the act, and the foregoing decisions is to be "liberally construed." The State Highway Commission, which these decisions say is "the state itself," has made an agreement with the appellant under which the grade crossing on Highway Route No. 16 was to be eliminated at a cost to appellant of $40,000.00; a creature of this State (the Board of Public Utility Commissioners) has made an order, the effect of which was not only to abrogate that agreement and require appellant to eliminate this grade crossing (and another) at an expense to appellant of $324,400.00 exclusive of the cost of acquiring the necessary land for 1940 feet of connecting roadway and exclusive of consequential damages, if any, to owners of abutting property, and thereafter pay the interest charges and the cost of maintenance on the increased expenditure, but also to direct its creator (the State) to do and perform certain things hereunder (R. 116, 121, 178).

Plan "C" was recommended by the State Highway Engineer and approved by the appellant (R. 136). The six blue prints all dated and signed by two representatives of each party (Exhibit "F," R. 145-150) comprise the general and detailed plans for the job. The notations on these plans not only show the character, dimensions and design of the structure, but they also show detailed specifications as to waterproofing, preparation and use of cement, size and character of materials and other explanatory details, including an itemized list of quantities, sizes, dimensions, locations, weight and use of material specified in classes, full engineering data and how various parts are to be spiked and fastened and every other detail necessary to enable a contractor to take the plan and carry out the job in accordance therewith. These plans also contain notes describing specifications and test quali-

ties of all materials to be used, including concrete, reinforced steel, reinforced bars, waterproofing and steel material, and explain how the concrete is to be poured and how the other materials are to be constructed and used with details of every joint, part or piece and diagrams of reinforcing and other operations.

These blue prints and the agreement as to who should do the work and the offer and acceptance of a contribution of $40,000 to be paid by the appellant toward the cost of the work, effected a complete and binding contract between the parties for the elimination of the grade crossing of Highway Route No. 16 and appellant's railroad, at the place in question, in accordance therewith. Acting on the good faith of this agreement, appellant prepared the detail plans and began the work of making physical changes in its railroad tracks, preliminary to carrying out the plan, and expended thereon approximately $5,000.

The proceeding instituted by the Board on its own motion, and its order made therein impair the obligation of that contract, which was made after full investigation and by solemn resolution, pursuant to the authority of the statute in such case made and provided.

Decisions as to Contracts.

In *Wharton* v. *Stoutenburgh* (35 N. J. E. 266), the Court of Errors and Appeals reviewed a decree of the Court of Chancery directing the execution of a lease in specific performance of agreement to lease certain mining lands. There had been some correspondence between the parties regarding the leasing of these lands and the lease had been prepared. The lessee had entered into possession of the premises but afterwards refused to execute the lease. The Court said:

(p. 274):

"The terms of the contract must be established by proofs, clearly, definitely, and unequivocally.

> But it is sufficient that the terms of the contract be made out in a manner satisfactory to the Court. The fact that the details of the agreement are controverted by the parties will not deter the Court from ascertaining what the terms of it really were, and giving effect to the agreement where a complainant shows himself to be entitled to a specific performance, by a part performance, which shall be referable only to a part execution of the agreement."

Applying the decision in that case to the facts in our own case, we find that while the resolutions of the State Highway Commission authorized elimination of the crossing by the plan agreed upon between and signed by the parties, nowhere is there a suggestion in the minutes and resolutions of the State Highway Commission that there was to be an agreement in writing. The details of material and construction are so completely shown on the face of the blue prints that there was nothing remaining for agreement between the parties. The plans were signed by both parties and the appellant began the work. No change was ever afterwards requested by the State Highway Commission either in the plans or in the form of the agreement, although the formal written agreement was never signed by the State Highway Commission (R. 39).

In *Donnelly* v. *Currie Hardware Co.*, 66 N. J. L. 388, the Supreme Court held that no contract had been made between the parties but it cited the decision of the Court of Errors and Appeals in *Water Commissioners* v. *Brown* (32 N. J. L. 504) from which is quoted (at p. 389), the following:

> "If it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, *so long as the contract remains without any acts done under it on either side.*"

In *Trenton and Mercer County T. R. Co.* v. *Trenton*, (90 N. J. L. 378), it was contended on behalf of the Railway Company that the terms of an agreement could not be enforced against it because the agreement had not been actually signed. In that case negotiations had been conducted between the Railway Company and the City of Trenton. The directors of the Railway Company passed a resolution authorizing the agreement. On the strength of this authority the City of Trenton passed an ordinance authorizing execution of the agreement on behalf of the city. Afterwards the directors of the Railway Company rescinded their resolution.

The Supreme Court cited *Wharton* v. *Stoutenburgh*, *supra*, and held that the principle of that case applied also in the case then before the Court, saying:

> "The draft agreement had been submitted by the city to the company; the company had assented to its terms; all that remained was for the executive officers to execute the written instrument in which the terms of the agreement were set forth; but the officers had no power to vary the terms, and it was not contemplated that the directors should again pass on the matter."
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> • • • • • • • • •

(p. 383):

> "We think there was a valid contract • • •"

In *McCulloch* v. *Lake & Risley Co.* (91 N. J. L. 381), the Supreme Court held that where the plaintiff leased a property to the defendant on terms orally agreed to and the plaintiff had sent a check for the first payment, that, although the lease had not been executed, a valid agreement had been made.

In *Mente & Co.* v. *Heller* (99 N. J. L. 475), it appeared that a contract had been negotiated between the parties by correspondence about which there was no dispute except that the respondents contended that this correspon-

dence did not constitute a contract since a written contract was later to be executed and delivered.

After quoting from the case of *Bettcher* v. *Knapp* (94 N. J. E. 433), the Court of Errors and Appeals held (p. 477):

> "We find nothing in the case before us indicating that a formal written contract was an essential part of the negotiations between the parties."
>
> • • • • • • • • •
>
> "In the case before us we find no ambiguity; no conflicting testimony as to the several letters and telegrams asserted as making for the alleged contracts and nothing that indicates that a formal written contract was an essential part of the negotiations between the parties to make the contracts complete."

In *Levine* v. *Lafayette Building Corporation* (142 Atl. Rep. 441), in the Court of Chancery, where all of the previous decisions are reviewed, there was involved the question of the validity of a memorandum which expressly provided, "formal contract to be signed on or before September 1, 1925" (p. 1200). After an exhaustive discussion of the authorities, it was held that even though one of the parties refused to execute the formal contract there nevertheless existed a binding agreement between the parties for the sale of lands. The decision was rested upon the finding that the proofs did not disclose that any material provisions were to be inserted in the "formal contract to be signed," which were not contained in or to be inferred from the *preliminary informal agreement* (p. 1202). The Court also found that subsequent to the execution of the preliminary agreement the complainant had paid to the defendant on account of the transaction, the sum of $4,000 which the Court held "waived the 'signing of the formal contract'" (p. 1200) and that the defendant had received the benefit of this payment.

There are numerous other cases, which are collated in 13 C. J. 305 and in Vol. I, Williston on Contracts, Sec. 28, p. 36. The general principle is stated by Williston as follows:

> "• • • the intention to make a legal obligation is not necessary for the existence of a contract though an expressed intent that there shall be no legal obligation is effective to prevent one. In the absence of such an expressed intent, mutual assent, informally given, to make an exchange of acts or promises is sufficient. Consequently, if such assent exists, to avoid the conclusion that a contract has been formed it must be found as a fact that the parties impliedly agreed that until the writing was executed they should not be bound. The burden of establishing this implication of fact is on the one who denies the existence of a contract. The decisions although not all perfectly consistent, generally conform to this test."

One of the cases cited by Williston is *Friedman* v. *Schleuter*, 105 Ark. 580; 151 S. W. 696; suit was brought to recover damages for breach of a building contract. The defendants advertised for bids according to plans and specifications which gave full details as to materials and dimensions. Plaintiff was the successful bidder and complied with all the conditions of the bid, but the formal contract was never executed. The defendants claimed that the contract was not complete because the advertisement and the specifications did not provide the time for payment or for the completion of the work. The court sustained a verdict for plaintiff, saying:

> "It appears • • • that all the terms of the contract were agreed upon, and its reduction to writing was intended merely for facility of proof as to its terms. In such case the provision for a contract in writing is not inconsistent with the present contract, and this is especially true in a case where the things to be done are provided in written plans and specifications, which are so definite

> and detailed as to present a perfect guide as to the rights and duties of the respective parties in the erection of the proposed building."

So, here, all the terms of the details of the contract had been settled by the negotiations between the Highway Commission and the appellant and reduced to writing, and carefully and minutely drafted into and upon the detail plans, which were then approved and signed by the duly authorized officers of the State, pursuant to the express authority of the statute. On the faith of this contract appellant actually began the work and expended a substantial sum of money thereon—then comes a subordinate agency of the State having no express authority under any statute, but purporting to act under a supposed implied authority of a statute passed fourteen years before the State Highway Commission was created, and takes the entire project out of the hands of the State's "*alter ego*" and orders a different plan of its own, which has not the approval of the department of the State having express and exclusive jurisdiction over the subject.

Obligation of the State.

Having exercised the power under Section 12 of the State Highway Department Act, to enter into an agreement with the appellant for the elimination of this crossing, this agreement, under the provisions of the same section, was binding upon the State of New Jersey.

It is well settled that the state may make an agreement and be bound thereby in the same manner as a private individual.

In *Fletcher* v. *Peck* (10 U. S. 87, 3 L. ed. 162), this court reviewed the action of the legislature of the State of Georgia in which it attempted by an act to divest certain persons of title theretofore granted by contract with the

state. In an opinion delivered by Mr. Chief Justice Marshall this court held that the act in question impaired the obligation of the previous contract and therefore violated the Constitution of the United States.

In *Trustees of W. & E. Canal Co.* v. *Beers* (67 U. S. 448, 17 L. ed. 327), this court considered an act of the legislature of proposing a composition with the creditors of the state who were the holders of bonds of a canal built by the state. This court held (p. 456):

> "Our construction of these Acts is supported by the facts that the state could not destroy the lien if she had designed to do so; that it was reasonable and just that she should protect a lien the sufficiency of which she had guaranteed, and that the plain and natural import of the language used, justifies this interpretation of the legislative intent."

In *Davis* v. *Gray* (83 U. S. 203, 21 L. ed. 447), this court considered an act of the legislature of Texas affecting a railroad company incorporated under a land grant, including an agreement to build a railroad. This court held (p. 232) as follows:

> "When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty. Curran *v.* Arkansas, 15 How. 308."

In *Hall* v. *Wisconsin* (103 U. S. 5, 26 L. ed. 302), this court considered an act of the legislature of Wisconsin authorizing the governor to enter into an agreement on behalf of the state with certain persons to make a geological, mineralogical and agricultural survey of the state. The State undertook to abrogate an agreement made under this authority with one Hall. This court quoted

the following from Justice Story's opinion in *Dartmouth Coll.* v. *Woodward* (4 Wheat. 694), at page 11:

> "But when the legislature *makes a contract* with a public officer, as in case of a *stipulated salary* for his services *during a limited period*, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens."

—and held (p. 11):

> "When a state descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly." *Davis* v. *Gray*, 16 Wall. 203 (83 U. S., XXI, 447).

In *Pennoyer* v. *McConnaughy* (140 U. S. 1, 35 L. ed. 363), it appeared that the legislature of the State of Oregon had passed an act authorizing the sale of swamp lands belonging to the state, which act the courts held amounted to an offer to sell such land under the conditions specified in the act. The appellant's predecessor in interest filed an application under the act but the first payment of 20% of the price was deferred by failure of the state authorities to complete, approve and file the maps and descriptions of the lands. Meanwhile, and before this was done, an act was passed and went into effect repealing the previous act. This court held that even though no consideration had been paid for the agreement of sale of land (due to the action of the state), the purchaser, nevertheless, acquired a vested interest in the property and a contract with the state for its conveyance to him, the obligation of which was impaired by the repealer which provided that certificates of sale should be cancelled where the 20% of the price had not been paid prior to a certain date therein mentioned. This court held (p. 25, 140 U. S.):

> "That legislation surely impaired the obligation of the contract Owen had with the state, for its effect was to destroy valuable property rights and privileges belonging to him. It was therefore vio-

lative of the Constitution of the United States. Art. 1, Sec. 10."

In *Louisiana P. S. Com.* v. *Morgans L. & T. R. & S. S. Co.* (264 U. S. 393, 68 L. ed. 756), this court reviewed an order of the Louisiana Commission directing the railroad company to repair a viaduct carrying a street over its railroad in New Orleans. The order was challenged on the ground that it was beyond the power of the commission and if within such power, enforcement would deprive the company of property without due process of law, and impair the obligation of its contract with the City of New Orleans, wherein the railroad company granted to the city the right to construct the viaduct over its right-of-way and twenty tracks upon the express condition that the city should pay for both erection and subsequent maintenance. The Commission claimed that it had power to make the order under the section of the Louisiana constitution, printed in full at page 398, of the Supreme Court's opinion, and that the state Supreme Court had so held in a case therein cited. Other provisions of the Louisiana constitution created the government of the City of New Orleans. This court held (p. 399):

> "Unless and until otherwise advised by the supreme court of Louisiana, we must conclude that the general control of its own streets is an ordinary governmental function of the city of New Orleans.
>
> It would require more definite language than we find in the Constitution of 1921, or in Gulf, C. & S. F. R. Co. *v.* Louisiana Pub. Serv. Commission, to convince us that the commission has power to assume control over all those streets within New Orleans which approach or cross railroad tracks, and to disregard the solemn contracts of the municipality with respect thereto. That the liability which the commission has undertaken to impose upon appellee conflicts with the contract under which the latter granted permission to construct the viaduct over its property, is not denied. Only very clear and definite words would suffice to show that

the state had undertaken to authorize a thing so manifestly unjust and oppressive."

In *Missouri, etc. Ry. Co.* v. *State of Oklahoma*, 271 U. S. 303, 70 L. Ed. 957, this Court reversed a decision of the Supreme Court of Oklahoma which had affirmed an order of the Corporation Commission of that state requiring the railroad to eliminate a grade crossing. The decision was put on the ground that an agreement had been made by the city to bear the cost of constructing the highway, in consideration of the donation of the right to cross by the railroad; that such agreement was valid and that the order of the commission requiring the railroad to bear the cost of eliminating the crossing impaired the obligation of the contract and deprived the company of its property without due process of law.

Article I, Section X, paragraph 1, forbids a state to pass any law impairing the obligation of contracts. An order of the Board of the Public Utility Commissioners of New Jersey made under authority (or color of authority) of the State Public Utilities Act, is a law of the State within the meaning of this provision of the United States Constitution.

Williams v. *Bruffy*, 96 U. S. 176; 24 L. Ed. 716;

L. E. & W. R. Co. v. *State Pu. Com.*, 249 U. S. 422, 424; 63 L. Ed. 684, 687;

Standard Computing Scale Co. v. *Farrell*, 249 U. S. 571, 577; 63 L. Ed. 780, 782;

King Mfg. Co. v. *Augusta*, U. S. S. C. Adv. Op. ~~May 292, decided (May 14, 1928)~~ 72 L. Ed. 544;

Sultan R. & T. Co. v. *Dept. of L. & I.*, U. S. Adv. Op. of June 1, 1928, p. 559; 72 L. Ed.—.

In *King Mfg. Co.* v. *Augusta* (U. S. Adv. Op. of June 1, 1928, p. 544; 72 L. ed., this court considered a case in which it was alleged that an ordinance of the City of Augusta, Georgia, violated the Constitution of the United States, by impairing the obligation of a contract between the

appellant therein and the city. This court held that the finding of the state courts on the question of whether there was an agreement was entitled to respect (p. 549),

> "But is not conclusive; for it rests with this court in cases like this, where contract obligations are said to have been impaired by subsequent legislation contrary to the constitutional restriction, to determine whether there was a contract and what obligations arose from it." (Citing cases.)

Even though in that case there was no formal agreement and such agreement as was claimed to exist arose from conversations and correspondence between representatives of the parties.

For these reasons it is respectfully submitted that a complete and binding contract existed between the State of New Jersey, acting by and through its State Highway Commission, and appellant, under which it was agreed that appellant would eliminate the grade crossing of State Highway Route No. 16 over its railroad according to a definite plan, and that the cost thereof would be apportioned and paid $40,000 by appellant and the balance by the State, and that the order of the Board violates the said provision of the Constitution of the United States.

III.

The Order of the Board, and the statutes under which it was made as construed by the Courts of New Jersey, violate the due process and equal protection clauses of the Constitution (Art. XIV, Sec. I), in that they

(a) *Constitute an unreasonable exercise of the police power by requiring an unreasonable expenditure for the elimination of said crossing, and thereby deprive the appellant of its property without due process of law;*

(b) *Confiscate the property of the appellant for the benefit of others, and*

(c) *Deprive the appellant of a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue of confiscation.*

The bill of complaint alleges that the order was an unreasonable exercise of the police power and thereby deprived the appellant of its property without due process of law in violation of the Fourteenth Amendment, and confiscates the property of appellant for the benefit of other persons and takes its property for public use without just compensation. (R. 27), and the testimony supports the allegation (R. 45, 58).

(a)

The order is an unreasonable exercise of the police power.

The exercise of the Board's power is predicated upon the police power.

The Courts have referred to the police power as "the limitless ether of force not yet occupied by substantive law." It has been called the "despotic" power of the sovereign. It is the application of the personal right or principle of self preservation of the body politic. (*Wynehamer* v. *People*, 13 N. Y. 378.) To its exercise there are no limits except the restrictions contained in the written constitution (*1 Thayer Const. L. 720; Jacobson* v. *Mass.*, 197 U. S. 11, 49 L. Ed. 643; *McLean* v. *Ark.*, 211 U. S. 539; *M. K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 42 L. Ed. 878.

Private corporations are subject to the police power, but such regulations must not conflict with the charter, nor take from a corporation any of its essential rights and privileges (*Cooley Const. Lim.*, 718; *L. & N. R. Co.* v. *Ky.*, 161 U. S. 677) (40 L. Ed. 849).

The Courts have never defined the limits of the police power because the quantum of force necessary for self defense is incapable of ascertainment in advance of the emergency. However, it is always a question for judicial determination whether in a given instance a person or a state used unnecessary force.

So long as all persons are impartially affected, the right of the sovereign to exercise the police power to the fullest extent of the reasonable requirements of the public welfare, includes the power to confiscate or destroy, but the police power is not a "night-stick" to be used to compel one person or class of persons to give up more than his or their share, or more than the public welfare reasonably requires, for the sole benefit, and convenience of others. Why should the owners of two public highways of equally legal authority and status be treated so differently? The railroad is strictly regulated in every phase, including income, outgo, and profits, by the Federal Government, and used by the public at large at the lowest rates consistent with an intended fair return. The public highway is unrestricted even in that portion of its traffic which competes with the railroad, is used free of charge by the public indiscriminately. Yet the owners of the securities and the patrons of the railroad must pay all the cost of accommodating the safety and convenience of the travelers on the highway.

That much, however, is settled by the cases, but this case presents a new question, namely, whether the police power is *reasonably* exercised when it requires these security holders and patrons of the railroad to pay more than twice the cost of providing the reasonable requirements of public safety and convenience, in order to provide nothing of safety, but a pure luxury of convenience. Appellant complains, not of the reasonable necessities of the situation, but only of the excessive requirements of the order of the Board.

In *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District* (233 U. S. 75, 58 L. Ed. 857), the railroad company had been ordered to destroy its existing bridge over the Kansas River and erect another at a different elevation. This Court said (p. 79):

> "The decisions also show that a state cannot avoid the operation of this rule *by simply invoking the convenient apologetics of the police power*. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. 'The State can do nothing that will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' (Citing cases.)"

The *Kaw Valley* case was decided long before the Transportation Act was enacted. The point is much more important now, since Congress has imposed upon the carriers the duty of "reasonable expenditures" for structures, including grade separations at railroad crossings and their maintenance. What this Court called "the convenient apologetics of the police power" certainly applies when the Board, to suit the preference of the people of a rural community, casts economic principles aside and attempts, as an exercise of that power, to require an interstate carrier to spend from $120,000 to $175,000 more than the public necessity and convenience of the situation reasonably require, or that any reasonably intelligent person, charged with any financial responsibility in the matter, could, in conscience, justify.

Mr. Hand, the Chief Engineer of the appellant; Mr. Vanneman, the Chief Engineer of the New York Public Service Commission (who has jurisdiction over and responsibility for all grade crossing eliminations in New York State where the public pays half the cost), and Mr. Diehl (who has many responsibilities of the same nature), all say the Board's order is a sheer waste of money, to

the extent of the difference in cost between the Board's plan and Plan "C" (amounting to from $120,000 to $175,000). In New Jersey, which is the only state in the United States where the law requires the railroad to pay all the cost of carrying out the Board's orders for elimination of crossings, the Board, having no consequent financial responsibility or incentive to economy, acceded to the importunities of a handful of residents of a rural community and made an order that would mulct the appellant of enough money to eliminate another crossing of equal importance. Where, as here, the Board is subject to none of the natural restraints of economic necessity or financial responsibility, the public interest (speaking in the broad sense of the Transportation Act) requires and the courts should apply the rule, even more strictly than elsewhere, to *compel* the observance of the principles of economy and sound judgment laid down in the Transportation Act.

As the New Jersey Court of Chancery said in the *Curtiss & Hill Co.* case *(supra)* "The work which it (the State Highway Commission) is to do is the construction and maintenance of a state highway system, reaching throughout the entire state and for the benefit of all the citizens, not merely in or for the benefit of any particular locality or the citizens thereof."

We contend that the railroad plan (Plan "C") adequately meets all the local requirements and, by eliminating the crossing in accordance therewith, the obligation of appellant would be performed to the full extent of public safety and convenience.

Analogous Cases.

The right of the state to order the elimination of a grade crossing at the expense, either in whole or in part, of the appellant depends upon the police power; and if it appears in any case that that power has been unreasonably or arbitrarily exercised, the order is invalid even though the statute upon which the order may have been based may itself be valid.

We have shown that the present order is far in excess of what the reasonable necessities of the situation require, and that the cost of conforming therewith is greater both for construction and maintenance of the under-pass, and the railroad bridge thereby required, than is necessary in order to meet the requirements of public safety and convenience.

In these respects the case is analogous to the numerous decisions which have restrained the action of the state or of an administrative board which has undertaken to fix or limit rates of public utilities in such a way as to prevent a fair return upon the value of the property. The principle upon which those cases depend applies to the present case; in the rate cases the courts have prevented the "taking" of the property of a utility for the use of the public without fair compensation; in the present case what the appellant seeks is to prevent the state, through the Board of Public Utility Commissioners, from taking such part of its property as exceeds the reasonable cost of eliminating this crossing for the use of the public by an unreasonable exercise of the police power.

There are several recent cases in which the principle has been applied to rate cases, to wit:

> *Public Service Railway Co.* v. *Board of Public Utility Commissioners*, 276 Fed. 979, application for preliminary injunction—appeal dismissed per stipulation 266 U. S. 636, 69 L. ed. 481.

New York Telephone Co. v. *Board,* 5 Fed. (2nd) 245 (May 2, 1925)—application for temporary injunction—affirmed 271 U. S. 23, 70 L. ed. 808.

Middlesex Water Co. v. *Board,* 10 Fed. (2nd) 519 (decided Jan. 7, 1926), on final hearing.

As held in these and numerous other like cases, the Fourteenth Amendment safeguards just compensation to the utility, and by that is meant "a reasonable return on the value of the property used at the time that it is being used for the public service" (*Telephone* case, *supra*).

If an order of an administrative utility board is of such a nature as to prevent a reasonable return and thereby deprive the utility of just compensation, it is held to be a violation of the Fourteenth Amendment; and on the same reasoning, if the property of a utility is taken from it to an unreasonable and excessive extent by the exercise of the power of the Board to order the elimination of a grade crossing, such action is equally a violation of the Fourteenth Amendment.

Granting as an abstract question the power of the state to eliminate a grade crossing, the question still remains in any particular case whether such power has had been exercised in a reasonable manner. In *Colorado* v. *U. S.,* (271 U. S. 153; 70 L. ed. 878) this court held that the power of a state to regulate intrastate traffic or to order a particular service, is subject to the limitation that the order must not be unreasonable.

Granting, for the purpose of argument, that a statute may be sustained as a reasonable exercise of the police power, an *order* made thereunder may nevertheless be invalid under the circumstances of the particular case. The principle is thus stated in the case of *Dobbins* v. *Los Angeles,* 195 U. S. 223, 49 L. Ed. 169, in which this court said:

> "It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances,

> and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinances is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

This principle is so well settled that it seems unnecessary to quote from other cases on the same subject, but the following decisions are cited:

> *Lawton* v. *Steele*, 152 U. S. 133, 38 L. Ed. 385;
> *Holden* v. *Hardy*, 169 U. S. 366, 42 L. Ed. 780;
> *Conway* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679;
> *Otis Elevator Co.* v. *City of Chicago*, 263 Ill. 419, 105 N. E. 338, 52 L. R. A. (N. S.) 192, 198.

In *Nectow* v. *City of Cambridge* (U. S. Adv. Op. of June, 1, 1928, p. 520; 72 L. ed.—), this court reviewed a judgment of the Supreme Court of the State of Massachusetts involving the validity of a zoning ordinance of the City of Cambridge. The question of fact in the case was whether the districting of the plaintiff's land in a residence district would promote the health, safety and convenience and general welfare of the inhabitants of that part of the city. It appeared in that case that before the passage of the ordinance the plaintiff in error had outstanding a contract for the sale of part of this land, but, because of the zoning restrictions contained in the ordinance, the purchaser refused to comply with the contract.

The opinion of this court delivered by Justice Sutherland is in part as follows:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restric-

tion cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Euclid *v.* Ambler Realty Co., *supra*, p. 395. Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the *locus* in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained."

The case of *Chicago etc. Ry. Co.* v. *City of Minneapolis*, 238 Fed. 384, is directly in point. There a railroad company obtained an injunction to restrain the enforcement of a municipal ordinance which required the company to change the elevation of its tracks. The injunction was allowed on the ground that the cost of the change, as required by the ordinance, was substantially in excess of the cost of the change as proposed in the railroad plan. We quote from the decision:

> "The police power of the state, whether exercised through the Legislature or municipalities, is very broad. It may be exercised for the safety, health, morals, convenience, or the general prosperity of the public; but it is not without limitation. When the police power exercised by a municipality is by means of an ordinance, such ordinance must have some relation to one or more of the objects above mentioned. The ordinance must not conflict with state or federal Constitution, nor with state or federal statutes. It must not arbitrarily, unnecessarily or unreasonably invade private rights or property (citing cases).

> In the present case, upon a careful consideration of the whole of the evidence, I have reached the conclusion that the ordinance in question is unreasonable, arbitrary, and void, and that the enforcement thereof would deprive the plaintiff and the interveners of their property without due process of law: First, because its provisions are in conflict with the statute of the State of Minnesota; second, because it includes within its scope the Lake street crossing, and such inclusion, as shown by the evidence of both the plaintiff and the defendant, is unnecessary, unreasonable, and arbitrary.
>
> Third, because the ordinance, while providing for a separation of railway and street grades, unnecessarily and unreasonably imperils the safety of the railway employes, and imposes unnecessary and unreasonable expense upon the plaintiff railway company, and the intervening railway company and industries, to the extent of several million dollars, amounting to a practical confiscation of their property."

That case is in point for the following reasons:

1. Like our case, it involves an order for the elimination of grade crossings.

2. It condemns a plan that unnecessarily and unreasonably imperilled the safety of railway employees. The Board's plan in our case provided for the projection of side and inter-track girders above the top of the rails, which are dangerous to passengers boarding and leaving trains at the station located at that point (R. 183), and they are likewise dangerous to employees who are required to walk between the tracks or get on or off of freight trains at that point. Appellant's Grade Crossing Engineer (R. 183) and Mr. Vanneman both objected to this feature of the Board's plan (R. 201).

3. It condemns the imposition of unnecessary and unreasonable expense upon the railway company.

4. It condemns the inclusion of a crossing which was shown by the evidence to be unnecessary to the main project.

The Board's order in this case calls for the closing of the crossing of Camp Lane located 1,400 feet from the crossing for the elimination of which the proceeding was instituted, and the acquisition of land for and the construction thereon of a connecting highway for a distance of 1,940 feet between Camp Lane and Route No. 16. No proceeding for the closing of that crossing was instituted. The Board's Chief Engineer refers to it as "a comparatively unimportant route" (R. 178). Its inclusion in the Board's plan involves an extra cost of $10,450, besides the cost of the land for 1,940 feet of connecting road (R. 188). The traffic record on that highway offered by the Board's Chief Engineer (Exhibit "C. 5," R. (between) 170-171), shows no justification for the expenditure of any money for its elimination. No witness said it was dangerous or impeded public traffic (R. 46). It was not even claimed or proven to be a public highway. It is located 1,400 feet away from the principal crossing involved (R. 45, 90), and since the Board's plan calls for raising the railroad tracks only six inches (R. 188), it cannot be physically affected by, and is not incidental to or necessary for, the elimination of the crossing on Route No. 16 (R. 46).

The undercrossing required by the Board's order exceeds the Legal Width of the Highway.

The duty of the Railroad Company, under Section 26 of the Railroad Law (Revision 1903, N. J. P. L., 1903, p. 645), is—

> "to construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right of way where any public or other road, street or avenue now or hereafter laid, shall cross the same, so that public travel on the said

> road shall not be impeded thereby, *and said bridges and passages shall be of such width and character as shall be suitable to the locality in which the same are situated;* • • •"

This statute does not mean that the crossing must cover the full legal width of the highway or even the full traveled portion thereof.

> *State* v. *Lackawanna R. R. Co.*, 84 N. J. L. 289, 296.

Section 6 of the Act to Establish the State Highway System provides:

> "In all cases the width of the pavement shall be at least eighteen feet and the total width of the roadway shall be at least thirty feet, except at bridges, culverts, *or grade crossings*, where the width of the roadway shall be of such width or widths as the State Highway Commission may deem necessary and determine" (2 Cum. Supp. 3079).

By its resolution of March 11, 1924 (R. 136), the State Highway Commission fixed and determined the width or widths of these under-passages at 18 feet on each side of a center pier and the character thereof as described and provided in Plan "C." That action has never been changed and the determination of this width and character of passages was within the exclusive province of the State Highway Commission. The Board of Public Utility Commissioners had no jurisdiction to order an under-pass of a different width or character from that fixed and determined by the State Highway Commission. Without some such express determination by the Highway Commission, appellant was not required by law to provide an opening greater than 30 feet. The power of the Board to change the width of a highway in a grade crossing order does not, in any case, give the Board unlimited authority to increase the width of highways. That power is limited by, and appellant has the reciprocal right to the benefit of, the minimum legal requirement unless and until another

width is fixed and determined by competent authority. The order of the Board requiring an undercrossing 66 feet wide is arbitrary and unreasonable in the absence of any proof of conditions requiring an undercrossing in excess of 36 feet wide, as determined by the State Highway Commission.

Camp Lane Crossing.

The Fielder Act prescribes certain jurisdictional requirements to justify an order of the Board, namely, if

> "it shall appear to the board that such crossing is dangerous to public safety, or that public travel on such highway is impeded thereby."

The order of November 24, 1926, instituting the proceeding for the elimination of the crossing on Route No. 16, did not purport to institute a proceeding for the elimination of Camp Lane crossing. Indirect reference was made to it in the following language:

> "It appears that any order issued by the Board in this proceeding for the separation of the grades of said highway (Route 16) and of said railroad *may affect* a road known as Camp Lane in said Township of Hillsboro, which is or may be claimed to be a public highway" (R. 119).

Far from this being the kind of a proceeding instituted by the Board authorized by Section 5 of the Act, this is only a suggestion, first, that this crossing *might* be *affected*, and second, that it *is or may be claimed to be* a public highway. There is no statement or even intimation of any intention to separate the grades at this crossing, or that it is a public highway.

As a matter of fact, Camp Lane will not be *affected* by the separation of grades on Route 16, according to the plan adopted by the Board, since the railroad tracks are to be raised only six inches at Route No. 16 crossing which will not change any physical condition at Camp Lane, which is 1,400 feet away (R. 45, 46, 90). It is there-

fore obvious that what the Board ordered for Camp Lane was in no way connected with or incidental to the separation of grades on Route 16.

Moreover, it does not appear anywhere that Camp Lane is a public highway. The question about its status raised by the Board at the beginning was never answered.

It is claimed, on behalf of the Board, that counsel for the appellant, at the hearings before the Board, admitted that Camp Lane was a dangerous crossing and that the Board accepted this admission as a basis of its order.

In the first place, when the jurisdiction of the Board is required by the Act to depend upon a judicial finding of fact, "that such crossing is dangerous to public safety, or that the public travel on such highway is impeded thereby," an admission of counsel (if made) could not be accepted, in lieu of proof, to confer jurisdiction. Consent of counsel cannot confer jurisdiction on a legislative tribunal. In the second place, no such admission was made. Counsel did agree not to offer any objection to the claim (R. 181, 182) that the crossing on Route 16 was dangerous, but in that instance the word "crossing" was used in the singular number and referred only to the crossing on Route 16.

The estimate of the Board's Chief Engineer for the changes ordered in Camp Lane was $10,450 (R. 188) and did not include anything for the cost of land for the 1,940 foot connecting road.

The traffic record of this crossing for Friday, June 3rd, Saturday, June 4th, and Sunday, June 5th (representing weekday, holiday and Sunday traffic in what is the most favorable season of the year for highway traffic), shows that on June 3rd, between 7 A. M. and 8 P. M., this crossing was used by sixty-eight automobiles and forty trucks (a total of 108 motor vehicles) and thirty-eight

pedestrians. Only nine wagons crossed on that day. On June 4th, between the same hours, there were sixty-eight automobiles and thirty-seven trucks (a total of 105 motor vehicles), sixteen pedestrians and three wagons. On June 5th, between the same hours, there were seventy automobiles, thirteen trucks (a total of eighty-three motor vehicles), fifty-three pedestrians and five wagons. There were a few bicycles and motorcycles each day (Exhibit C. 5, R. 170-171). By counting every class of movement, including pedestrians, there were 167 on June 3rd, 140 on June 4th and 156 on June 5th. This fairly illustrates the unimportance of this crossing and yet the Board's order would require an expenditure of $10,450 plus the cost of the necessary land for the connecting road to close the crossing and build the connecting roadway between Camp Lane and Highway Route No. 16.

In *Potter* v. *Public Utility Commissioners* (89 N. J. L. 157) the Court held that there was nothing in the Fielder Grade Crossing Act "which gives the Board jurisdiction to order private property taken *when* (as in this case) *such property is not fairly incidental nor necessary to the elimination of the danger or impediment at the crossing involved in the petition and order.*"

Certainly the elimination of Camp Lane crossing was not "fairly incidental or necessary for the elimination of the danger or impediment at the crossing" on State Highway Route No. 16, *since Camp Lane crossing is 1,400 feet from the Highway Route No. 16, and, inasmuch as no change in the track levels were contemplated or ordered which could create any possible relation, legal, physical or otherwise, between the two crossings.*

The order of the Board respecting Camp Lane was, therefore, purely arbitrary and unreasonable.

(b)

The Order Confiscates Appellant's Property for the Benefit of Others.

The evidence shows that the Board's order and plan required the appellant to make an expenditure, for the sole benefit of property owners and residents of the community in which the crossing is located, of $120,000 or more, in excess of the reasonable requirements of the situation and in excess of what is reasonably required to remove the conditions of danger to or impediments of highway traffic claimed to exist at the present grade crossing of Route No. 16. Also that the Board's order requires the appellant to bear the entire cost of the proposed improvement estimated at $324,400 when, otherwise, under its agreement with the State Highway Commission, it was required to bear only the definite sum of $40,000 of that cost. Also that the Board's order required the appellant to provide a strip of its land (R. 45) 33 feet wide and 240 feet long (R. 211) without compensation for the widening of Highway Route No. 16 across appellant's right of way and property at the crossing, and require it to construct an under-crossing 66 feet wide with provision for two 20-foot roadways and two 8-foot-6-inch sidewalks, on a highway whose legal width is 33 feet, and upon which there is a traveled roadway only 20 feet wide with an improved permanent pavement 18 feet wide; also that said order requires appellant to make an expenditure of $10,450 plus the cost of acquiring land for a 1,940-foot connecting road for the closing of Camp Lane crossing without any proceedings having been instituted for that purpose and without any evidence to show that Camp Lane is a public highway or that said crossing created any danger to or impediment of highway travel.

This taking of the appellant's property is for the sole benefit of property owners and residents in the vicinity of the crossing.

(c)

The Order of the Board and the Statutes under which it was made, as construed by the Courts of New Jersey, deprive the appellant of a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue of confiscation.

In the petition for rehearing filed in the court below, appellant urged that the denial of the New Jersey Supreme Court of a review of said order of the Board, and the statutes under which the order was made, deprived the appellant of its property without due process of law, in that thereby the appellant was refused, and deprived of, the right to a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order confiscates the appellant's property (R. 104-108).

The only review of an order of the Board given by the statute or available to an aggrieved party, is that described in Sections 38 and 39 of the Public Utilities Act, reading as follows:

> "38. Any order hereafter made by the board may be reviewed upon certiorari by the Supreme Court. No certiorari to review any such order shall be allowed unless application therefor be made within thirty days from the date upon which such order becomes effective, nor unless notice in writing of such application shall have been given to said board, with a copy of the affidavits or proofs upon which such application is based; notice of such application shall be served upon the secretary of said board, either personally or by leaving the same

at the office of said board in the City of Trenton. The Supreme Court is hereby given jurisdiction to review said order of the board and to set aside such order in whole or in part when it clearly appears that there was no evidence before the board to support reasonably the same or that the same was without the jurisdiction of the board. The evidence presented to the board, together with the findings, and the order issued thereon, shall be certified by the board to the Supreme Court as its return. No such order shall be set aside in whole or in part for any irregularity or informality in the proceedings of said board unless such irregularity or informality tends to defeat or impair the substantial right or interest of the prosecutor in certiorari. If, with respect to any order brought under review by certiorari, it shall appear equitable and just that a rehearing should be had before said board, the Supreme Court may order that such rehearing be had upon such terms and conditions as are reasonable, and the said board shall thereupon proceed to rehearing on the testimony theretofore taken before it, and upon which the order under review was based, and upon such additional testimony, if any, as may be produced. As the result of such rehearing the board may readopt such order, or alter, amend, modify or extend the order theretofore made by it.

Whenever a judgment of the Supreme Court upon certiorari to review an order made by said board shall be appealed to the Court of Errors and Appeals, and said Court of Errors and Appeals shall deem it equitable and just that a rehearing should be had before said board, the said court shall remit the record and proceedings before it to the Supreme Court, to the end that said court may order that such rehearing may be had before said board upon such terms and conditions as are reasonable, as hereinbefore provided" (N. J. P. L. 1911, p. 388; as amended N. J. P. L. 1918, p. 305; 2 Cum. Supp. p. 2896).

"39. The allowance of a writ of certiorari or in the institution of any proceeding to review any

order of the board by the Supreme Court as aforesaid, shall in no case supersede or stay the order of the board, unless the Supreme Court, or a justice thereof, shall so direct, and the appellant may be required by the Supreme Court, or a justice thereof, to give bond in such form and of such amount as the Supreme Court, or the justice thereof allowing the stay, shall require" (N. J. P. L. 1911, p. 388; 2 Cum. Supp. 2897).

Writ of certiorari is the proper, and only, remedy to review an order of the Board.

Acquackanonk Water Co. v. *Commission*, 97 N. J. L. 366 (Sup. Ct.), affirmed by the New Jersey Court of Errors and Appeals; 125 Atl. Rep. 33.

Although, (as the Supreme Court observed in that decision) the setting aside of an order may not afford the prosecutor complete relief.

The New Jersey Supreme Court has construed Section 38 as limiting its power to set aside an order of the Board made within its jurisdiction to cases where there is *no evidence* to support reasonably the order.

Middlesex Water Co. v. *Board*, 140 Atl. Rep. 254;
Middlesex Water Co. v. *Board*, 140 Atl. Rep. 256;
Eastern N. J. Power Co. v. *Board*, 140 Atl. Rep. 258, 259;
Elizabethtown, &c. Co. v. *Board*, 95 N. J. L. 18.

The New Jersey Court of Errors and Appeals has construed these sections of the statute as conferring upon the Supreme Court merely the power to set aside an order and not to compel the Board to revise its order or make a new one.

Public Service Co. v. *Board*, 87 N. J. L. 581 (affirming the Supreme Court, 84 N. J. L. 463);
Erie v. *Board*, 90 N. J. L. 271.

The allowance or refusal of a writ of certiorari is discretionary with the State Supreme Court and is, therefore, not subject to a review.

Cavanagh v. *Bayonne*, 63 N. J. L. 176, 179;
Woglom v. *Perth Amboy*, 80 N. J. L. 469, 470.

In the present case the appellant applied to a justice of the Supreme Court for a writ of certiorari to review this order, as the only means of review provided by the statute. Exercising his discretion, he denied the writ (R. 98; 137 Atl. Rep. 443), without prejudice, however, to an application to the Supreme Court *in banc*. The appellant then applied to the Supreme Court (*in banc*) and that application was denied in the exercise of the discretion of the Court (R. 102; 137 Atl. Rep. 923). The applications for writ of certiorari were timely made. The Board's order was made April 26, 1927, and served a few days thereafter. The first application for review was made May 14, 1927, and denied May 17, 1927. The second application was made on May 23, 1927, and denied on May 31, 1927. The appellant had then exhausted its remedies in the State courts and had been denied any review of the order. On June 1, 1927, appellant filed its bill of complaint in the court below.

Our contention is that the act not only fails to provide but, as construed by the courts of New Jersey, expressly denies a means of review of an order of the Board *as of right*, and not only fails to provide, but expressly denies the party aggrieved by such an order, the right or privilege to submit the issue of confiscation (as raised in this case) to a judicial tribunal for determination upon the independent judgment of such tribunal, as to both the law and the facts involved in the case.

That the function of the Board under the Fielder Act is legislative, and not judicial, is settled by the decision of the New Jersey Supreme Court in *Erie R. R. Co.* v.

Board (89 N. J. L. 57); affirmed by the Court of Errors and Appeals, on the opinion below (90 N. J. L. 672). One of the questions raised and argued before the Court in that case was that the Fielder Act violated the New Jersey constitution by conferring upon the Board judicial powers belonging exclusively to the Court of Chancery. The New Jersey Supreme Court (p. 91) rejected this contention and held that all the questions claimed to be of a judicial nature—

> "• • • are determined by the statute, leaving nothing of a judicial nature to be adjudicated by statutory tribunal excepting the applicability of such legislative scheme to a given state of facts if it be found to exist, and the determination thereupon of the practical methods of accomplishing the legislative object."

To the same effect see *Keller* v. *Potomac Elec. Power Co.*, 261 U. S. 428, 440, 441; 67 L. Ed. 731, 735.

The Board is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment of the legislature.

> *Bluefield W. W. & I. Co.* v. *Public Service Com.*, 262 U. S. 679, 683; 67 L. Ed. 1176, 1179.

In *Ohio Valley Water Company* v. *Ben Avon Borough*, (253 U. S. 287; 64 L. Ed. 908), the situation was as follows:

The Pennsylvania Public Service Commission determined the value of the property of the Water Company for rate purposes. The Water Company appealed.

The Public Service Company Law (Pa.), (approved July 26, 1913, amended June 3, 1915, Pa. P. L. 779), Article VI, provides as follows:

> 17. "• • •, any party to the proceedings effected thereby may appeal therefrom to the Superior Court; • • • The said court is hereby clothed with exclusive jurisdiction throughout the

> Commonwealth for the purpose of hearing and determining any and all said appeals: * * *."
>
> 18. "* * * Jurisdiction is hereby conferred upon the Superior Court to hear and dispose all such appeals, * * * subject to appeal to the Supreme Court, as hereinafter provided as in all cases of appeals from the findings, determinations and orders of the Public Service Commission."

Up to this point it will be observed that the Pennsylvania Act differs from the Fielder Act in that the former does, and the latter does not, give an appeal *as of right*.

Section 19 of the Pennsylvania Act (like Section 38 of the New Jersey Act), does not give a mandatory supersedeas with an appeal, but makes such supersedeas discretionary with the Court, and provides for a bond.

Section 22 provides:

> "At the hearing of the appeal the said court shall, upon the records certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law."

Section 24 provides:

> "If the court shall, upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the commission. If the court shall, upon the record find that the order appealed from is unreasonable or based upon incompetent evidence materially effecting the determination or order of the commission, or is otherwise not in conformity with the law, it may enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law."

The order of the Pennsylvania Commission was reversed by the Superior Court which fixed a higher valuation and directed the Commission to revise its order

accordingly. On appeal to the Pennsylvania Supreme Court, that Court reversed the decree of the Superior Court and reinstated the order, on the ground that there was competent evidence tending to sustain the Commission's conclusions, and no abuse of discretion appearing, the Superior Court should not have interfered therewith, and said:

> "A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the Commission upon the question of values, there was merely the substitution of the former's judgment for that of the Commission, in determining that the order of the latter was unreasonable" (260 Pa. 289).

The judgment of the Pennsylvania Supreme Court was brought to this court on writ of error. After reciting the history of the proceeding, this Court said (pp. 288, 289):

> "Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal.
>
> "The order here involved prescribed a complete schedule of maximum future rates *and was legislative in character* (citing cases). In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment.

Missouri P. R. Co. v. J. W. Tucker, 230 U. S. 340, 347, 57 L. Ed. 1507, 1509, 33 Sup. Ct. Rep. 961; *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 660, 661; 59 L. Ed. 405, 411; *P. U. R.* 1915 A, 106, 35 Sup. Ct. Rep. 214; *Missouri v. Chicago B. & Q.*

R. Co., 241 U. S. 533, 538, 60 L. Ed. 1148, 1154, 36 Sup. Ct. Rep. 715; *Oklahoma Operating Co.* v. *Love*, (March 22, 1920) (*March 22, 1920*) 252 U. S. 331, ante, 596, 40 Sup. Ct. Rep. 338, 64 L. Ed. 596.

Here the insistence is that the Public Service Company Law, as construed and applied by the supreme court, has deprived plaintiff-in-error of the right to be so heard; *and this is true if the appeal therein specifically provided is the only clearly authorized proceedings where the Commission's order may be challenged because confiscatory. Thus far plaintiff-in-error has not succeeded in obtaining the review for which the 14th Amendment requires the state to provide.*"

In a dissenting opinion, concurred in by Mr. Justice Holmes and Mr. Justice Clarke, Mr. Justice Brandies said:

"Whether the appeal to the Superior Court fails for the reason assigned, or for some other reason, to satisfy the constitutional requirements of a judicial review we need not determine; because the statute left open to the company, besides this limited review, the right to resort to the state courts, as well as in the federal court, to another and unrestricted remedy; the one commonly pursued when challenging the validity of a legislative order of this nature, namely, a suit in equity to enjoin its enforcement."

In the cases above cited, the New Jersey Court of last resort has held that under the New Jersey Statute there is no other remedy restricted or unrestricted. The *only* remedy prescribed or permitted thereby is by writ of certiorari and that is discretionary. And the exercise or refusal to exercise that discretion is not reviewable. Appellant applied twice for such a writ and it was twice denied. Of course the statute could not deny to appellant the right to challenge the validity of the order in a suit in equity in the Federal Court, but it was not safe to resort to that remedy until it had exhausted every reason-

able means of obtaining a proper review in the state courts.

Prentice v. *Atlantic Coast Line*, 211 U. S. 209; 53 L. Ed. 150.

The result is that the language of Sections 38 and 39 of the Utilities Act and the limitations upon review therein contained, as construed by the state courts, place the appellant herein in a less favorable position with respect to the question of due process of law than that in which this court found the Ohio Valley Water Company to be. Our case is stronger in the following particulars:

(a) The Pennsylvania statute gave an appeal *as of right*: The New Jersey statute permits a review only by means of a discretionary writ with no review of the refusal to exercise that discretion.

(b) The Water Company had its review before two Pennsylvania courts; our application for review was twice denied.

(c) The Pennsylvania statute authorizes the Superior Court to determine whether or not the order appealed from is *reasonable and in conformity with law*: the New Jersey Act gives the state court the right to set an order aside only when it *clearly appears* that there was *no evidence* before the Board to support reasonably the same or when it *clearly appears* that the order was without the jurisdiction of the Board.

(d) This Court found a denial of due process, not because the Pennsylvania statute by its terms withheld from the Court the power to determine the question of confiscation according to their own independent judgment, but because that was the effect of the decision of the Supreme Court of Pennsylvania in construing the statute. Under the New Jersey act the Court is expressly denied the right to determine any question on its own independent

judgment. It cannot set an order aside if there is *any* evidence reasonably to support it. In this case the Supreme Court twice refused to give appellant an opportunity to bring the record before it for consideration of the question of fact or law on the issue of confiscation.

Subsequent cases involving this question, with respect to orders of State Boards or Commissions in which this Court has cited and followed the decision in the *Ohio Valley Water Company* case are as follows:

Keller v. *Potomac Electric Power Co.*, 261 U. S. 428; 67 L. Ed. 731;

Bluefield Water Works & Improvement Co. v. *Public Service Commission*, 262 U. S. 679; 67 L. Ed. 1176;

Ohio Utilities Co. v. *Public Utilities Commission*, 267 U. S. 359; 69 L. Ed. 656;

Northern Pacific Ry. v. *Department of Public Works*, 268 U. S. 39; 69 L. Ed. 836.

In cases involving the authority of the state to order the elimination of grade crossings, reliance has often been placed upon the case of *N. Y. & N. E. R. R. Co.* v. *Bristol*, (151 U. S. 556; 38 L. Ed. 269). That case involved a statute of the State of Connecticut and one of the questions raised was whether the appellant was denied due process of law by the provisions of that statute as construed by the state courts. This court sustained the constitutionality of that act and held that there was no denial of due process of law thereunder. That case did not involve any question of the failure of the statute itself to provide for an independent judicial review of the orders of the State Commission.

The Connecticut act involved in that case (General Statutes of Connecticut (Rev. 1920), p. 924, *et seq.*), provided, with respect to review of the orders of the Commission, as follows:

Section 3718 (p. 926) provides:

> "The decisions of the commissioners relating to any matter upon which they may act under the authority of sections 3713, 3714, 3716 and 3717, shall be communicated to the petitioners and to all persons to whom notice of the hearing on said petition was given, within twenty days after the final hearing; and any person aggrieved by such decision, who was a party to said proceeding, *shall have the same right of appeal therefrom* as is given by section 3747 concerning appeals from decisions relating to depots."

Section 3747 (p. 933) provides:

> "Any person aggrieved by any order of the railroad commissioners, upon any proceeding relative to the location, abandonment, or changing of stations to which he was or ought to have been made a party, *may appeal* from such order to the superior court of the county in which the cause of appeal shall arise, within thirty days after the publication of such order, by a petition in writing • • •. Said court *may hear said appeal and re-examine the question of the propriety and expediency of the order appealed from* • • •, *and shall proceed thereon in the same manner as upon complaints for equitable relief;* and in case said order is not affirmed, *may make any other order in the premises that it may deem proper* and which might have been made by the railroad commissioners, and may award costs at its discretion. *Such appeal shall be a supersedeas of the order appealed from until the final action of the court thereon,* • • •."

It will be noted that the Connecticut statute provides an appeal *as of right*, with equity jurisdiction and the power to revise or reform the order, with a mandatory supersedeas pending review. This is different from our Section 38 of the New Jersey Utilities Act, which limits review to the discretionary writ of certiorari, and from our Section 39 which provides only for a discretionary stay. This Court considered the question whether the

Connecticut Act violated the due process clause, and held that thereunder;

> (a) There could be no objection that a hearing was not required or accorded "in view of the protracted proceedings before the commissioners *and the Superior Court and the review in the Supreme Court.*"
>
> (b) "The *right of appeal* saved the railroad companies from any harm from their findings" (involving a review of facts as well as law).
>
> (c) "Nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained *in a mode suited to the nature of the case*, and not merely arbitrary and capricious."

While some of the decisions above cited happen to involve rate statutes or rate orders, there is no reason for distinguishing between statutes or orders relating to rates and those involving other subjects of regulation of public utilities where the denial of constitutional guaranties is claimed.

Statutes and orders of both classes arise from the same authority and have the same general purpose of regulating public utilities in the interest of public necessity, convenience, safety and general welfare. In New Jersey all regulatory orders whether they relate to rates, service or the elimination of grade crossings, arise from the authority of the same statute. If the statute is unconstitutional for the purpose of one class it must be also unconstitutional for the purpose of the other class, since the procedure is the same for both classes of orders.

The same constitutional questions arise under both classes.

Here it is claimed that the order of the Board is unreasonable and confiscatory because it requires an expenditure of a sum of money twice as large as the law or

public necessity, convenience, safety or general welfare requires. These are questions of fact. If the appellant is to be denied *any* review of the judgment of the Board on these questions (as it has been by the repeated refusal of the New Jersey Supreme Court to allow a writ of certiorari, which is the only means of review available under the law) certainly the appellant is utterly defenseless, except by appeal to the Federal Courts, and it becomes the victim of what Dean Pound calls a system of "justice without law."

If the due process clause of the Constitution of the United States guarantees to appellant the right to an independent judicial determination of these questions of fact and law by an impartial tribunal (as this court held in the *Ohio Valley Water Company* and other cases elsewhere cited herein), that right must hold regardless of the subject matter of the order.

The instant case is a striking illustration of the imperative need of providing and preserving a review *as of right* of orders of regulative state agencies.

The statutes of New York, Connecticut, Pennsylvania and some other states have preserved a *right* of appeal but the statute of New Jersey is an example of the extremely restrictive type, where there is no review *as of right*, but only a discretionary review by certiorari limiting the power of the Court to set aside an order only where it *clearly appears* that there is *no evidence* to support reasonably the order or that the order is without the jurisdiction of the Board.

Under New Jersey practice a writ of certiorari to review the decisions of other administrative bodies operates as a supersedeas and at once puts an end to further proceedings in the cause or matter removed for review.

McWilliams v. *King, et al.*, 32 N. J. L. 21;
McQuade v. *Emmons*, 38 N. J. L. 397;
Hunt v. *Lambertville*, 46 N. J. L. 59;
Helfer v. *Simon*, 53 N. J. L. 550, 553;
Barrett v. *Atlantic City*, 85 N. J. L. 134, 137;
West Jersey Traction Co. v. *Camden*, 58 N. J. L. 536, 539;
Bloomfield v. *Glen Ridge*, 55 N. J. E. 505, 510.

But Section 39 of the New Jersey Public Utility Act makes an express exception to this general rule and provides that even if the Supreme Court should exercise its discretion to review an order on certiorari, the issuance of such a writ does not act as a supersedeas or stay the execution of the order of the Board unless the Supreme Court, in another exercise of its discretion, shall so direct, and then only upon the filing of a bond in such form and amount as the Court may direct.

In the present case, the Board instituted its own proceedings before itself, without any showing of facts or conditions involving the public safety, convenience, or welfare. By its own direction, and before any hearing was held, to consider the need of eliminating the crossing, its own employees prepared a definite plan. All the testimony on the jurisdictional question of danger to or impediment of public travel was presented by the Board itself through its employees. All the Board's witnesses were examined by the member of the Board who conducted the hearings.

The only answer to the bill of complaint filed in this suit was that of the Board itself and the only appearance of any of the several defendants in the court below was that of the Board's own attorneys, who presented the only argument in support of the Board's order.

This procedure emphasizes the necessity for a review of the order by an independent judicial tribunal on questions of fact as well as of law.

The Public Utilities Act (N. J. P. L. 1911, p. 387, provides as follows):

> "33. In default of compliance with any order of the board when the same shall become effective, except orders to resume service which has been discontinud the person or public utility affected thereby shall be subject to a penalty of one hundred dollars per day for every day during which such default continues; in default of compliance by a public utility as herein defined with any order of the board when the same shall become effective, directing such public utility to resume service which has been discontinued, the person or public utility affected thereby shall be subject to a penalty of two hundred and fifty dollars per day for every day during which such default continues, such penalties to be recovered in an action of debt in the name of the State, and observance of the orders of the board may be enforced by mandamus or injunction in appropriate cases, or by suit in equity to compel the specific performance of the order or orders so made, or of the duties imposed by law upon such public utility" (2 Cum. Supp. 2895).
>
> "35. Any person who shall knowingly and willfully neglect, fail or omit to do or perform, or who shall knowingly and wilfully cause or join or participate with others in causing any public utility corporation or company to neglect, fail or omit to do or perform, or who shall advise, solicit or persuade, or knowingly and willfully instruct, direct or order any officer, agent or employee of any public utility corporation or company to neglect, fail or omit to do any act or thing required to be done by this act shall be guilty of a misdemeanor" (2 Cum. Supp. 2896).

Under Section 218 of the Crimes Act of New Jersey (N. J. P. L. 1896, p. 794), a misdemenor is punishable by a fine not exceeding $1,000 or by imprisonment with or without hard labor, as the Court may direct, or any term not exceeding three years, or both (2 Com. Stat. 1812, Sec. 218).

If the Supreme Court, in the exercise of its discretion, refuses a writ of certiorari to a person aggrieved by an order of the Board (as it refused the appellant in this case) he stands defenseless under the laws of New Jersey and is confronted with the necessity of either complying with an order, however burdensome, arbitrary, unreasonable or unlawful it may be, or of submitting to the penalties and prosecutions specified in Section 33 and if the order is against a corporation any officer, agent or employee or any other person connected with it who neglects, fails or omits or instructs, directs or orders such neglect, failure or omission, thereby becomes guilty of a misdemeanor punishable by a fine not exceeding $1,000 or by imprisonment with or without hard labor, as the Court may direct, or any term not exceeding three years, or both.

For non-compliance with this order (except for the supersedeas granted by the Court below), the Board is authorized by the statute to sue for and collect penalties of $100 a day and to compel observance by mandamus or injunction or by specific performance and to initiate criminal proceedings against the officers, agents or employees of the company for the commission of a misdemeanor.

To sum up the power of the Board under the New Jersey law, as illustrated by this case: The Board possesses the composite power of a complainant to institute a proceeding; to present witnesses to prove the facts without regard to rules of procedure or of evidence; to act as attorney to try the case, as judge to conduct the trial, as jury to determine the questions of fact, as the Court to render and enter judgment, as the sheriff to execute the judgment and as the prosecuting attorney to punish the refusal or failure to comply with the judgment; and provides its counsel to oppose an application for review and to defend its own judgment when its validity is questioned in the courts.

In such a case, the commission often becomes what has been called "that judicial monster, a judge in his own cause."

For these reasons it is respectfully submitted that the order of the Board, and the statutes under which it was made, violate the due process and equal protection clauses of the Constitution.

IV.

Discussion of the Opinions Below.

The Opinion of the Board.

The plan adopted by the Board was prepared by its own engineer at its direction, and was presented and recommended by him. His is the only testimony offered to support it. He stated that he made no study or plan for elimination by relocation of the highway (R. 180), although the order instituting the proceeding announced that the relocation of the highway was one of the methods of elimination to be considered (R. 118); and he offered no testimony in opposition to any feature of the appellant's plan "C."

The Board's opinion says (referring to Route No. 16):

> "All parties consent to the elimination of the grade crossing" (R. 122).

The appellant did not consent to the elimination of that crossing by means of the Board's plan. On the testimony of its own employees, as to Route No. 16 and without any testimony either showing that Camp Lane road was a public highway or was dangerous to or impeded public traffic, the Board found:

> "That both of these crossings are dangerous to public safety and that the public travel thereon is impeded by their existence as grade crossings" (R. 123).

In its decision the Board admitted that the appellant's plan shortened the undercrossing and lessened its cost (R. 124).

Nevertheless that plan was rejected (R. 125), and the Board ordered the appellant, at its own expense, to abolish both grade crossings according to its own plan (R. 115). The decision of the Board is silent as to the legal width of the highway, but states, without any evidence to support it, that the highway is in the process of being widened to a uniform width of 66 feet and straightened by reducing the number of curves and increasing the radii of sharp ones, although it admits the additional property required in the vicinity of the highway has not been acquired. On the strength of this statement it orders the undercrossing to be constructed 66 feet wide (R. 115), thereby taking, by mere fiat, 33 feet of the railroad company's real estate, without providing for any compensation or resorting to the formality of acquiring the same either by negotiations or condemnation as required by the New Jersey Eminent Domain Act (N. J. P. L. 1888, p. 79; 2 Comp. Stat. 2182).

Without any testimony to show the need of sidewalks in this farming community or that there was any development present or prospective in the community and in spite of the undisputed testimony that there are no sidewalks on the highway on either side of the railroad, the Board found:

> "The necessity for sidewalks is now evident and will increase with the developing of the community" (R. 126).

In spite of the undisputed testimony that the present portion of the traveled highway is only 20 feet and has been permanently paved to the width of only 18 feet, and without any testimony to show the need for two 20-foot roadways, the Board announced its opinion:

> "That no bridge should be constructed of less width than the 66 foot right of way, being acquired

> by the State Highway Department • • • that two highways not less than 20 feet wide, measured between curb lines, should be provided" (R. 126).

The only objection offered to the appellant's plan related to the 6-degree curves. The Board's engineer offered no criticism of them. The engineer employed by the County of Somerset said they were perfectly safe and accessible under all conditions.

Contrary to all the evidence and without any evidence to support the conclusion, and notwithstanding the express adoption of these same 6-degree curves by the State Highway Commission which has exclusive jurisdiction of the highway, the Board condemned the 6-degree curves proposed in Plan "C" as in direct opposition to the State's policy, saying:

> "The State has defined its policy concerning the building of the highway in no uncertain terms; Chapter 107, P. L. 1918, among other things, state: 'All sharp turns and angles should be eliminated whenever practicable, and the Highway Department is working to this end. It appears to the Board that the introduction of curves, even though they be no sharper than six degrees, are unnecessary in this instance and are in direct opposition to the State's policy of eliminating curvature on highways wherever practicable, even though maintenance of the highway on tangent would increase the cost of elimination. The Board finds, therefore, against the adoption of the railroad plan' " (R. 125).

This statement ignores the obvious meaning of the words "sharp turns and angles." A 6-degree curve is neither a sharp turn nor an angle. The responsibility for carrying out the State's policy concerning sharp turns and angles rests upon the judgment, not of the Board of Public Utility Commissioners but of State Highway Commission and that that commission did not consider a 6-degree curve a sharp turn or an angle, is shown, without dispute, by its action in proposing Plan "C," in the first instance,

and expressly designing those curves (R. 39); in approving and signing the plan containing them (Exhibit "F," R. 145-150); in preserving 18 curves, each exceeding 6 degrees, in this same highway as permanently improved by the Commission (Exhibit "D," R. 128); and in recording in its minutes that:

> "A six degree curve • • • is not considered serious by the State Highway Commission" (R. 137).
>
> "In addition to that it was pointed out that there are other points on this route where the curvature is 6 degrees or more" (R. 138).

The only other witnesses who referred to the curves were private citizens of the community who objected to the curves because the relocation of the highway might affect their private property. They showed no competency or qualification to testify on the merits or demerits of the curves. The objections thereto were merely opinion testimony based upon no stated facts or qualifications. On the contrary it appears without dispute that the State Highway Commission had officially adopted these curves at the suggestion and recommendation of the State Highway Engineer, and the testimony of well-qualified engineers with many years of training and experience in the precise subject involved, shows overwhelmingly that the proposed 6-degree curves do not introduce any element of danger or inconvenience to highway travel and would be as safe and convenient as if the road were straight; that the elimination of grade crossings on straight highways by the relocation of a section of the highway in order to bring the crossing as near as possible to a right angle, is the standard and uniform practice in New Jersey and New York and elsewhere in the elimination of grade crossings, for the reason that thereby the costs can be greatly reduced without increasing the danger or inconvenience in the use of the highway; that the plan proposed by the appellant was entirely feas-

ible, practicable and safe and was the most economical plan that could be adopted and that the plan approved by the Board was seriously objectionable in that it provided for girders projecting above the level of the rails of the track which would endanger passengers getting on and off trains at the station (R. 183), and also because the placing of girders between the tracks extending above the level of the rails was contrary to standard practice (R. 201) on account of interference with employees getting on and off of trains and walking along the tracks.

In view of this testimony the Board was not justified in construing the language of Chapter 107, P. L. 1918, as requiring a straight highway at this crossing (R. 125).

The Board (R. 125) sought to minimize the difference in the cost of the two plans by saying:

> "The cost of this project (Plan "C," as revised) is estimated to be $205,184.70 including the Camp Lane diversion, which is exclusive of all property and collateral damages except for the property actually needed for the construction of the new highway. • • • Under this plan no detour is necessary during the construction of the new work but when the present grade crossings are vacated the owners of land adjacent to the present highway, between the ends of the proposed diversion, will be left in a cul-de-sac. Damages accruing to such owners must be added to the estimate of the Railroad Company which must materially decrease the difference in cost of the two plans."

The statement contained in the last sentence is contrary to the evidence. The Board made no investigation of such damages. One or two property owners sought to support their opposition to a relocation of the highway by threats of extravagant claims for damages. There was not a word of evidence before the Board either to show that any legal damages would result from the diversion of the highway, or if so, what it would amount to, except that of Mr.

Johnston, Engineer of Grade Crossings of appellant, who testified, concerning his estimate (Exhibit "1," R. 153) of cost under Plan "C":

> "The item of $1,000 contained in the estimate (R. 154) includes the right of way necessary for the relocation of highway Route No. 16, and the cost of deepening the brook to provide drainage for the underpass and damages to property owners" (R. 190).

He also testified:

> "As a matter of fact the estimate of $205,184.70 included what the railroad company's engineers and real estate experts considered an adequate allowance for property to be acquired and damages to other property affected."

This estimate was deemed adequate, since the property consisted entirely of farm low land in a rural community, and no buildings or improvements, other than on railroad property, are affected (R. 53). This testimony was not contradicted.

The Opinion of New Jersey Supreme Court.

The only opinion of that Court was that filed by a justice thereof upon the denial of appellant's first application for a writ of certiorari (reported 137 Atl. 442, R. 98). The second application was denied by that Court *en banc* without opinion (decision reported 137 Atl. 923, R. 102).

The Justice, in his opinion, did not consider the points raised by appellant before him under the Federal Constitution and statutes. He said that he had "no doubt whatever about the jurisdiction of the Board," and that this jurisdiction was not "challenged" at the hearing (R. 100). But the appellant had a right to assume that the Board would not make an unlawful order; it could not anticipate the nature or extent of the order which the Board might make.

The fact that the appellant, in an endeavor to persuade the Board to adopt a plan that could be carried out at a reasonable cost, voluntarily suggested the enlargement of its Plan "C" to provide a 66-foot undercrossing, did not confer upon the Board jurisdiction to order its own plan with a 66-foot undercrossing. Consent of the parties cannot confer jurisdiction upon a statutory tribunal. If such a voluntary suggestion was a consent it applied only to the appellant's plan. There is no evidence to support the Justice's statement that traffic would be choked by two 18-foot roadways (R. 100).

The Highway Commission itself originated and officially adopted that plan and never changed its official action in that respect. The statute requires a pavement of only 18 feet in width and a roadway of a total width of 30 feet, except at certain places, including grade crossings, where the roadway is to be of such width as the State Highway Commission may deem necessary or determine. That Commission had *determined* that the two 18-foot roadways were sufficient at this crossing (R. 136).

The Justice was not justified by any evidence in stating that two sidewalk spaces were necessary or that "the rights of foot passengers on State roads have been too long overlooked, and they are receiving attention none too soon" (R. 100). If this is so, it is not the duty of the appellant to provide sidewalks on State roads. That is a local improvement provided by the public authorities and usually paid for by the owners of abutting property. In any event the supposed need of sidewalks on State roads would not be supplied by providing two 8-foot 6-inch sidewalks for a distance of a hundred feet under this bridge when there are none anywhere else on the highway in the vicinity of the crossing.

There was nothing to justify the Justice's conclusion that it was within the jurisdiction of the Board to include

within its order as an "incidental" matter, the closing of the crossing on "a minor road" called Camp Lane, because "similar action has been taken by that body more than once" (R. 100).

In *Erie R. R. Co.* v. *Board* (89 N. J. L. 57; affirmed by the Court of Errors and Appeals on the opinion of the Supreme Court, 90 N. J. L. 672) the New Jersey Supreme Court sustained an order of the Board for the elimination of fifteen crossings (in one order) under the Fielder Act because it appeared that like conditions prevailed at all of them and that, with the exception of only one, they were all so close together that one could not be eliminated without seriously affecting the others, due to the fact that the plan required a substantial elevation of the railroad.

In *Potter* v. *Public Utility Commissioners* (89 N. J. L. 157) the New Jersey Supreme Court held that there was nothing in the Fielder Act

> "which gives the Board jurisdiction to order private property taken when such property is not fairly incidental nor necessary to the elimination of the danger or impediment at the crossing involved in the petition or order."

There is no such relationship between the crossings at Route No. 16 and Camp Lane. They are 1,400 feet apart, and since the railroad tracks were to be raised only six inches at Route No. 16 crossing, Camp Lane crossing cannot possibly be affected by carrying out the Board's plan (or the appellant's plan) for the elimination of the crossing of Route No. 16 (R. 45, 90).

Likewise there was no justification for the Justice to rely (R. 100) on the mere supposition, unsupported by any facts, of Mr. Remsen that, *if* a certain highway should be authorized by the legislature, traffic thereon *might* be diverted to this crossing (R. 208, 209). An assumption predicated upon an assumption does not justify the taking

of appellant's property or money to provide for such a remote contingency.

In the face of the undisputed testimony that there would be no obstruction to view under Plan "C," the Justice was not justified in holding:

> "It is asserted in the affidavits that a 6-degree curve is a perfectly safe curve. Very likely it is, where the road is on the level and the visibility is unimpaired; but *between the walls of a cut*, any curve is objectionable and usually dangerous" (R. 99).

There are *no* "walls of a cut" and the visibility *is* unimpaired under that plan.

The testimony that the visibility of highway travelers on the highway would not be impaired by the curves, was predicated expressly upon, and took into full acount, the nature and extent of the depression of the highway, as shown on the plan (R. 43, 44, 58, 68, 79, 80, 190, 191, 192, 193).

The Justice in his opinion (R. 99, 100) and the Court below (R. 15) both fell into the same error, the first in assuming that the appellant's figures "omit items which would go far toward equalizing matters" (R. 100) (the cost of the two plans), and the second, in stating

> "If, however, the cost of acquiring additional land is taken into account, this amount (the difference between cost of the two plans) would undoubtedly be considerably reduced, as found by the Commission and Justice Parker."

The difference in cost between the two plans cannot be disposed of in this casual manner. There was no evidence to support the statement of the Board. These statements are not only unsupported by, but are directly contrary to the evidence. Moreover, under the laws of New Jersey, such a property owner is not entitled to damages.

It has been decided by the courts of New Jersey that, when a portion of a street is vacated, persons owning lands upon the portion not vacated, are not deprived of any vested rights in property for which they are entitled to compensation (*State, Kean* v. *Elizabeth*, 54 N. J. L. 462).

The "damage to adjacent property" mentioned in Section 2 of the Fielder Act (Appendix "B"), relates only to legal damages. No consequential damages accrue to the owners of private property resulting from the exercise of the police powers. To the extent that the public welfare requires the exercise of such power, all persons affected are amenable thereto and bound thereby. In fact Section 4 of the Fielder Act provides:

> "Where the order of said board shall require changes in, or the removal of the property or construction of any • • • company or corporation, co-partnership or individual, they shall, at their own expense, move or change the grade or location of their property or constructions in conformity with the order of said board" (Appendix "B").

The Justice was not justified in stating in his opinion (R. 99):

> "The requirement of a straight road at such a place as this is essentially sound, and to turn a great state road at such a place from a straight line to a *crooked* one would be to court disaster."

The road proposed in Plan "C" is not "*crooked*."

Nor is it a sufficient warrant for taking $120,000 of appellant's money and its property, that:

> "No recipe has yet been found for preventing the careless motorist, and all too many of them are careless, from hugging the inside of a curve, in whatever direction he may be going" (R. 99).

The New Jersey Traffic Act (Chapter 174, N. J. P. L. 1915, pp. 285, 286) provides as follows:

> "2. (1) On all public roads, highways, turnpikes or streets, the following rules and regulations shall be effective:

> (2) A vehicle shall keep to the right, and when the improved portion of a road is of sufficient width, the vehicle shall keep to the right of the center of such road, except when passing a vehicle ahead."

In the revision of this act (Chapter 281 N. J. P. L. 1928, pp. 721, 733) Section 5, Article VIII contains the same requirement.

The appellant has no obligation, under the statutes or otherwise, to protect the "careless motorist" from a violation of the statute or to render the public highways fool-proof, nor was the Court below justified in following the Supreme Court Justice's views in this respect (R. 15) and holding that—

> "The action of the Public Utilities Commissioners would seem to be most reasonable" (R. 16).

The Opinion of the District Court.

The Court below, in its decision denying an interlocutory injunction, said: "The Court in determining what is reasonable does not substitute its own judgment for the determination of the Commission" (R. 14) and stated that it was "not obliged to choose between two methods." It also assumed that the Board had "perfectly good reasons for the choice" (R. 16). It is not a question of "choice between two methods"; it is a question of the legal rights and duties of the appellant.

It was because the Superior Court of Pennsylvania had substituted its "judgment for that of the Commission" (260 Pa. 289) that the Pennsylvania Supreme Court reversed the Superior Court's decision in the *Ohio Valley Water Company* case (*supra*), and it was precisely this error of the Pennsylvania Supreme Court that this Court corrected when it reversed that court and sent the case back for the purpose of having the Superior Court *substitute its own judgment for that of the Commission* if the facts in the case warranted it.

These statements of the Court below are the essence of its judgment both in denying an interlocutory injunction and in dismissing the bill of complaint, and constitute a denial of due process of law under the decisions of this Court. (*Ohio Valley Water Co.* v. *Borough of Ben Avon*, and other cases cited under Point III, subhead (c).)

The Court below quoted from Justice Holmes' opinion in the *Paterson* case (254 U. S. 395):

> "If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."

In the first place the Court below therein begs the question. The principal issue in this case is that *it cannot reasonably* "be said that safety requires the change" in the manner ordered by the Board.

In the second place a new governmental policy toward the "bankruptcy" of the carriers and toward their "engagement in interstate commerce" has been since declared by Congress in the Transportation Act, 1920. (See cases under Point I.)

In the Court below appellant cited other cases than the *Los Angeles Station* case (264 U. S. 331) in support of its contentions under the Transportation Act, 1920, although none of them are referred to in its decision (R. 13-17). The Court's statement that—

> "Certainly, a fair return upon railroad property was never intended to be secured at the *peril* of the public using the highways of a state"

was not justified by the evidence. There was no evidence that the plan offered by appellant would create a "peril of the public using the highways of a state." On the contrary, every engineering witness testified that no danger or inconvenience would result from the adoption of that

plan. The opinion of the Court below did not refer to any of this evidence.

The Court below was not justified in saying that Plan "C" would require "the traveling public to go around three curves and a *longer distance* to arrive at the same place" (R. 16), when the undisputed testimony shows that the distance by Plan "C" is only 124 feet (R. 173) or 125 feet (R. 192) longer than by the Board's plan.

The appellant's claim of an agreement with the State Highway Commission was disposed of by the Court below in the following words:

> "Prior to the action of the Public Utility Commissioners, the State Highway Board had considered changing the route of the State Highway to meet the plans of the Railroad Company. No action was taken, however, beyond discussion; no contract was signed and the Highway Board requested initiation of the action taken by the Public Utility Commissioners and now under review."

This statement is erroneous, for the following reasons, as shown by the undisputed proof:

1. The plans for changing the route of the highway originated, not with appellant, but with the State Highway Commission itself, and it requested the appellant to accept that suggestion and pay $40,000 toward the cost (R. 135, 136), and the appellant consented to the proposal (R. 38, 39). The State Highway Engineer, at the direction of the State Highway Commission, prepared the plan accordingly (R. 136) and after the appellant and the State Highway Engineer had agreed upon all the details of dimensions, type of construction, quantities and character of materials, and everything else necessary to enable a contractor to carry out the plan, a complete set of general and detail plans, showing all of this information, was prepared and signed on behalf of the State Highway Commission by its State Highway Engineer and its Bridge

Engineer, and on behalf of the appellant by its Chief Engineer and its Bridge Engineer (Exhibit "F," R. 145-150, R. 39).

2. These negotiations amounted to more than "discussion." They resulted in a consummated agreement on every detail, officially approved by both parties (R. 136, 38, 39), which agreement was repeatedly defended by the State Highway Commission by formal motions and resolutions on its minutes, when the terms thereof were criticised by the local authorities (R. 137, 138, 139).

3. It is true that no formal written contract was signed (except the plans themselves), but the undisputed testimony is that all the details of the contract were agreed upon and approved by both parties (R. 38, 39), and the work of eliminating the crossing under the terms of that contract was actually begun by appellant and approximately $5,000 was expended by it in reliance thereon (R. 38). It is true that the State Highway Commission adopted a motion on March 24, 1925 (R. 143), (more than a year after it had agreed with appellant upon the plan and the division of the cost (R. 136) and more than three months after the plans had been signed and the terms of the contract had been agreed to) to instruct its State Highway Engineer (whom it had previously authorized to make that contract with the appellant) to make application to the Board for an order to eliminate this crossing. Such an application was never made to the Board, but if it had been made, our claim is that there was a binding contract in existence at that time, which was abrogated or impaired by the Board's order, as argued under Point II.

The appellant's petition for rehearing (R. 104) was denied without comment or opinion.

On the final hearing the Court below dismissed the bill of complaint (R. 1) without comment or further opinion.

V.

The Court below erred in refusing to grant a permanent injunction, as prayed in the bill of complaint, and in dismissing the bill.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the case remanded with instructions to grant to the appellant a permanent injunction restraining the enforcement of said order of the Board of Public Utility Commissioners.

E. H. BURGESS,
GEORGE S. HOBART,
DUANE E. MINARD,
Counsel for Appellant.

APPENDIX "A."

Summary of Testimony Before the Board.

I.

The testimony before the Board as contained in the stipulated statement of evidence (R-177) including Exhibit S-1 (R-172) is as follows:—

Mr. Mead, the Chief Engineer of the Board, at the direction of the Board, prepared and presented a plan (Part of Exhibit "A" annexed to and made a part of the order of the Board) (R-116) which, as finally revised and adopted (R-188) proposed to depress Highway Route #16, and elevate the tracks 6 inches at the present location of the crossing, providing highway grade approaches of 3 percent on the north side and 3.16 percent on the south side of the railroad tracks (Exhibit "H," R. 152) at a cost of $307,950. (R-188) plus $6,000. to provide a detour for highway traffic during construction. (R-189). It provides an undercrossing 66 feet wide between abutments (R-180) with a vertical clearance of 14 feet (R-179); with a 20-foot roadway on each side of a center pier (R-189), and a sidewalk of a clear width of 8' 6" on each side of the undercrossing (R-188). It also provides for the closing of a grade crossing at Camp Lane (R-188). "A comparatively unimportant route". (R-178) (located approximately 1220 feet east of the Route 16 crossing (R-45), and the construction of a connecting road (for a distance of approximately 1940 feet (R-45)) along the south side of the railroad between Camp Lane and Route 16 (R-179) at a cost of $10,450. (R-188) or a total cost of $324,400. (Exhibit "J" R. 42-45). This plan requires the acquisition of no additional land (if retaining walls are provided along the depression), except for the 1940 feet of connecting road between Camp Lane and Route 16 (R-180). The estimate of cost includes nothing

for the acquisition of this land nor for any consequential damages to abutting property which might result from the depression of the highway. The plan provides girders on the outside and between the tracks of the railroad which project above the top of the rail about six inches (R-180). The Camp Lane connection can be located almost anywhere since it would cross only open fields (R-179). The only feasible way of eliminating this crossing is by carrying the highway under the railroad. Mr. Mead made no study or plan of the elimination of the crossing by relocation of the highway (R-180). The time required to do the work according to his plan is one year (R-188). There are now no sidewalks on the highway on either side of the crossing and the plan merely provided for space for sidewalks (R-189). The length of the bridge, measured along the railroad would be 134 feet and the width measured along the highway would be 105 feet. (R-180).

Mr. Mead also presented records of highway and railroad traffic at Route 16 crossing and at Camp Lane crossing (R-178), (Exhibit C-5, fol. 125-a, R170-171). Also a series of photographs showing views from all four directions at each crossing. (Exhibit C-4, R-170-171), and an Atlas sheet showing the location of the crossing and the houses and buildings in the vicinity. (Exhibit C-6, R-170-171). He testified that Route 16 crossing is used a great deal and trains pass at high speed frequently. The angle of the crossing is 29 degrees 30 minutes; that in his opinion Route 16 crossing is dangerous to public safety and travel is impeded by virtue of the grade crossing. (R-180). He did not know what the present width of the highway Route 16 is, but he was informed that it was being widened to 66 feet (R-189). With respect to cost, the girders of the bridge vary as the square of the plan, and the floor varies directly as the span so that with respect to the floor a span twice as long will cost twice as much

and with respect to the girders a span twice as long will cost four times as much (R-189).

Mr. Johnston, Grade Crossing Engineer of the appellant, presented a plan known as Plan "C" providing for diverting the alignment of highway Route 16 to pass under the railroad at a point 150 feet east of the depot (400 feet east of Route No. 16, R 37). The relocated highway would be constructed with 6 degree curves (radius 955.37 feet). The bridge to consist of a two span flat concrete slab top with no girders projecting above the rails. (R-182). There is serious objection to having girders protrude above the rails (as contemplated in the plan presented by Mr. Mead and adopted by the Board), where trains are stopping at the station (located at this point) on account of the possible danger that passengers might incur in alighting or getting on the train in stumbling over the girders. He proposed a concrete slab top for that reason and also for the reason that it is objectionable in any event to put girders between the tracks of a railroad. This form of bridge is also proposed as being more economical than steel construction. Under this plan the grades of the highway approaches would be 3.2% on the north side and 1.1% on the south side of the railroad. (Exhibit "H", R 152.) The width of this bridge measured along the highway is 75 feet. The relocation of the highway is proposed because it shortens the length of the bridge by changing the angle of the crossing from the present 29 degrees to the proposed 54 degrees. The relocation of the highway therein proposed would facilitate the construction of the Camp Lane connecting road proposed by Mr. Mead. A connecting road from Camp Lane to Route 16 could be constructed under this plan at a distance of 168 feet south of the center line of the railroad. (Exhibit "H," R. 152.) The width of this bridge than if Route 16 crossing was eliminated on its present location, (R-183), and would intersect Route 16 at a

greater angle. The Camp Lane connecting road as proposed in the plan of Mr. Mead would involve a very acute angle unless it was swung around. The cost of the Mead plan is at least double that of Plan "C". Plan "C" calls for the relocation of Route 16 for a distance of 900 feet or more, (950 feet, R 37) east of the crossing and for 1200 feet (1300 feet, R 37) west (or south) of the crossing. In stating that the Board's plan would cost twice as much as Plan "C", he took into consideration that under Plan "C" land would have to be purchased for the relocated portion of Route 16. The difference between Johnston's figures and Mead's figures is largely the cost of the bridge and the raising of the tracks. The sidewalks proposed by Mr. Mead would also increase the cost, and the cost of drainage at the undercrossing at the present location would be more expensive than at the proposed location. The junction of Camp Lane road with Route 16 in Plan "C" is located 55 feet south of the railroad with a depression of 7 feet. But this junction could be constructed so that the highway travellers would have an unobstructed view in both directions (Exhibit "G", R 151). Plan "C" contemplated no elevation of the railroad tracks and provides the same 14 foot underclearance at Route 16, undercrossing, as the Board's plan. It also provided for a straight highway approach of the undercrossing of 65 feet on the south side and 200 feet on the north side, measured from the ends of the center pier, respectively (R 184). The driver of a vehicle moving on the 6-degree curves, provided in Plan "C," would be able to see ahead in the line of travel for a distance of 500 feet and would at all times have a clear view for that distance, but since this road is out in the country where it is flat on each side, there would be a view for an indefinite distance. (R 186-187). Plan "C" in substantially the same form as offered by Mr. Johnston, with the same type of elimination, curvature and location of columns, was approved by the State Highway Engineer before

the proceedings before the Board were commenced. (R-190, 192). The only difference being in details—the plan approved by the State Highway Engineer (and the State Highway Commission) showed more detailed information than is shown on Plan "C" as presented to the Board (R-192). The estimated cost of carrying out Plan "C" is $145,024.47 (estimate offered before the Board as Exhibit RR-8, Exhibit I, R-153-155). A further estimate was made providing for a Camp Lane road connection, at an additional cost of $7,660.23 (offered before the Board as Exhibit RR-9, Exhibit I, R-155), making a combined cost of the project $152,684.70, as compared with Mead's estimate of $318,400. (plus $6,000. for a detour pending the construction). Under Plan "C" no detour would be required since during construction traffic would continue to use existing crossing. Johnston's estimate includes $1,000. for right of way for the relocation of Route 16 and the deepening of brook to provide drainage for the proposed undercrossing and damage to property owners. (R-190). The cost of this property was estimated at what was considered a fair value for it. The cost of possible condemnation proceedings to acquire it was included in the engineering and incidental items of the estimate intended for contingencies, such as condemnation proceedings. No damage to property cut-off from the state highway by reason of the relocation, was included because such damages are not recognized as legal damages. Damages to other properties which were considered to be affected by the relocation were included in the items for engineering and incidentals. The proposed relocation of Route No. 16 increases its length by only 125 feet. Under Plan "C" the grade of the highway approaches to the undercrossing would still be 3.29% on the north side and 1.1% on the south side of the railroad and the length of these approaches would be 500 feet and 800 feet, respectively. The grade on the north approach would be approximately the same, but the grade of the south approach is much

less on Plan "C", than on the Board's plan. The length of the undercrossing on Plan "C" is 70 feet and on the Board's plan 110 feet (R-192). Plan "C" provides no sidewalk spaces, but at a subsequent hearing, Johnston suggested the possible enlargement of Plan "C" so as to provide a 20 foot roadway on each side of the center pier and a sidewalk 9 feet wide on each side of the undercrossing. (R-191). The estimated cost of this enlargement is $52,500. (Exhibit I, R-155, Note), and it would provide the same number and width of roadways, the same vertical underclearance and the same number of sidewalks (each 6" wider) as the plan offered by Mr. Mead and adopted by the Board. (R-193, 212), and the total cost of the enlarged plan would be $205,184.70 (R 191) (as compared with $324,400. for the Board's plan).

The railroad property at this point is in the neighborhood of 240 ft wide; the right of way itself is 100 feet wide (R 211).

Mr. Johnston testified that a motorist passing around a 6 degree curve, as proposed in Plan "C", has an ample view for a distance of at least 500 or 600 feet ahead; a 6 degree curve will not impede travel in the least and will not obscure or endanger a traveller passing around the curve (R190); that on the same highway (Route #16) where its permanent improvement has been completed, there are, in a distance of 27.38 miles, 18 curves that are in excess of 6 degrees (R 191, Exhibit "D", R. 128). The grades of the approaches to the proposed undercrossing in Plan "C", on either side, enable a highway traveller to see under the bridge. The fact that the highway is depressed would not affect the traveler's view within a range of 500 feet. The descent to the undercrossing begins 800 feet south, and 500 feet north of the crossing. As a traveller starts to descend the approaches to the undercrossing he can look through under the bridge for a distance of at least 600 or 700 feet. On this account

the grade of the approach on the south side of the railroad is more favorable under Plan "C" than in the Board's plan. The grade of the approach on the north side is approximately the same in both plans (R. 192). With respect to the obstruction of the bridge to views of highway travellers on these approaches, the bridge would constitute a greater obstruction under the Board's plan than under Plan "C", on account of the longer undercrossing required by the former plan (R. 193).

(further testimony of Mr. Johnston is given in the summary of the testimony contained in the affidavits in this case.)

Mrs. Kremer testified that she owned a store and an acre of ground which would be taken off of the state highway by the relocation proposed by Plan "C" which would require people coming to the store "To come down and go up again", which she thought would damage her property. She offered no other objection to Plan "C". (R-185).

Mr. Young testified that he owned land on this road and objected strongly "against a curve in this road for no reason". He objected to the construction of the junction of Camp Lane connection with Route No. 16, because it was too close to the abutment of the bridge, which he thought would create a dangerous situation because Camp Lane connection would connect with Route No. 16 on a curve. (R-185), and the abutment of the bridge would cut off the driver's view as he came into the state highway. This he thought was a dangerous situation. He thought this connection could be constructed with the bank cut off or lowered so that a vehicle coming out of the Camp Lane connection would have a clear view. (R-186). This objection was met by changing the location of this junction on Plan "C" to a point 250 feet south of the railroad so that the depression at the junc-

tion would only be 3½ feet below the level of the surrounding ground, thus providing an unobstructed view to travellers on Camp Lane connection or on Route No. 16. (R 189), and providing for such junctions at right angles with Route No. 16 (Exhibit "G" R-151) (R-190). Mr. Young objected to the proposed curves in the relocated roadway. He said they had no state highway vehicle law or traffic signs to stop traffic and that they had fast traffic on the road (R-185). (This is a mistake since Section 16 of the Motor Vehicle Act (N. J. P. L. 1921, p. 643) prescribes the speed at which motor vehicles shall be operated in the various localities and under various conditions therein described and limits the speed of an automobile in "open country" to 30 miles an hour. (4 Cum. Suppl. to Comp. Stat. 1996). Chapter 244 (N. J. P. L. 1927, p. 461, Sec. 4), amends the traffic act by providing:—

> "• • • all state highway routes, or any road, street, highway or turnpike or section thereof, which may be designated by ordinance of the Board or body charged with the duty of the maintenance thereof, shall be known as a 'Full Stop Street'"

to be designated by a sign prescribed in the act and when such a sign has been erected—

> "It shall be unlawful for the driver of any vehicle to enter or cross any 'Full Stop Streets' so designated and marked, until he first brings his vehicle to a complete stop at a point not less than ten feet from the curb line, or, if no curb line, the nearest side of such 'Full Stop Street' • • •". (p. 461).

Mr. Young testified that he was a contractor and has built roads and bridges; that there are a great many places around the state where more than a 6% curve is constructed on improved highway; that it would be unusual to build a curve of this decree where the road is straight; that there are a lot of roads with the same curve; a lot more have to be when circumstances warrant

it being there, (R-185); that his principal objection is making a curve in a straight road (R-186).

Mr. Ketter testified that he owned property ½ mile south of the location in question, and the elimination of the crossing would affect him insofar as he travels the road twice a day. He considered it dangerous to go underneath that railroad and that curve. He knows what it means to have the view obstructed. "It wouldn't affect the property in any way". If for a distance of 350 feet, where the new road passed under the railroad, it would be on a straight line, the view would not be obstructed going towards the under-pass. But if one was travelling 35 miles an hour it would not take long to reach the point. If he could see a vehicle 500 feet ahead when rounding a 6 degree curve, he would not contend that the view was obstructed (R. 186). Such a view is provided by Plan "C" (R-186-187).

Mr. Wright testified that he was the owner of property on the south and west side of the station. His personal objection ("outside of the objection against the curve") was to the dead ends of the present road produced by closing the crossing under the railroad at the present location and relocating the road as proposed in Plan "C". He bought his place because it was on a developed road and handy to the station and Somerville. He thought "these gentlemen" hadn't taken into account damages they would have to pay him if they go around the curve. If they would give him the property between the new and old road it would compensate his damages. He had two children who go to school at Somerville by bus. Now they go to the corner at the end of his line to get the bus. If the road was relocated they would have to walk to another corner across the road, crossing the traffic on the highway. (R-187)

Mr. Epps, (Jr.) testified that he objected to the plan for Camp Lane road as suggested by Mr. Johnston but

his objection would be met if the proposed connecting road would start somewhere near the elbow of the present Camp Lane road and go about 200 feet south of the road (R-201) (This objection was met by the change of this connecting road at a point 250 feet south of the railroad (R-189).

Mr. Goodkind, Bridge Engineer of the State Highway Commission testified that the commission's improvement on either side of the railroad indicates an acquisition insufficient properly to obtain a 66 foot right of way, but that the existing right of way is 33 feet wide. (R-201).

Mr. Remsen testified that he was the director of the Board of Freeholders of Somerset County (R-207); that he is familiar with Route No. 16, and that several curves therein have been reduced (R-209)—at six points mentioned, but he does not say what the curve was either before or after the change; he has observed the policy of the Highway Commission in the construction of roads to eliminate curves wherever possible and he knows of no instance where curves have been placed in a straight road. He referred to a bill before the legislature for a proposed new highway system which, if constructed, would probably, (but not necessarily), carry its traffic through Route No. 16 at the place of the crossing. If that system was constructed and should carry its traffic over Route No. 16, it would add to the traffic conditions on the route (R-208); that the new highway if constructed would turn its traffic into Route No. 16 is "the conclusion anyone would draw, knowing the territory about these locations." The Board of Freeholders have been fighting to keep this straight line in. Public sentiment in Somerset County is very much for a straight line. "I do not think it is a safe and practicable plan to put this curve in this highway at this point." (R-209)

Mr. Young testified that he resides in the vicinity of the proposed underpass and is familiar with Route No.

16, at that location. There is a 6 degree curve in the highway about one-quarter mile from the crossing. He testified to two accidents happening there, but his statement of the cause was merely his conclusion. (R 209). Near the property of Kaiser there was a curve about 6 degrees in the old highway that was eliminated by the construction of the new highway. (R 210).

Mr. Crammer testified that he owns property which would be affected in value by the proposed change in Route No. 16. This property is used for a store and would be off the road. (This is the same store referred to by Mrs. Cremer.) Another piece of property would be between him and the state highway. If the state highway remained at its present location, he would not accept an offer of $20,000 for his property. If the state highway is relocated as proposed in Plan "C", "I guess my property is worth nothing, or it would come down to a few hundred dollars of property and the main thing is the business would be gone as far as I can see as a business man." (R 210). (There was no testimony as to the value of his property or how much, if any, it would be damaged by the relocation of the highway.)

Mr. Epps (Sr.) testified that he was in the lumber and coal business and lived within a few hundred yards of the proposed undercrossing; that he is more or less familiar with real estate values. He thinks the proposed relocation would damage Mr. Wright's property "to the extent of one-half at least". He did not know what Mr. Wright's acreage was although he is familiar with the house and property, generally. This change would cut Mr. Wright off from the highway, but he could find access to the new highway by using the present highway. (R 210). (There was no testimony as to the value of Mr. Wright's property).

Mr. Hill testified that he was President of the Board of Education of Hillsboro Township. Scholars cross

and recross this road from the north side to the Liberty School house located about one-quarter of a mile south of the railroad track. There are scholars who come from the north of the track. All the high school children are transported to Somerville in buses. Parents have appealed to him to use his influence to keep the road straight. He does not feel it is safe for children to pass and repass on a curve. "I consider that it is absolutely unsafe". The smaller children walk from the north side of the railroad to the Liberty School to the south side. The greater area of the school district is north of the crossing. (R-211). He did not know whether the number of students attending from the north is the largest. In his opinion it would be more dangerous for children to walk through an underpass on this curve than to walk through the underpass on a straight highway. (R-212) (Plan "C" proposes an undercrossing on a tangent 265 feet (R-184) plus 75 feet long (R-183), or a total of 340 feet long with an unobstructed view of the highway for a distance of 500 or 600 feet ahead. (R-190)). His experience is that all traffic cut corners and they will cut corners on the curves. (R-212). (He did not testify how many children attend at the Liberty School house or how many of the children live north of the crossing. For those who do live north of the crossing the increased distance they would have to travel by the relocated highway is 125 feet (R-173), or 125 feet (R-192).

Mr. Wasser, former State Highway Engineer, was employed by the Freeholders of Somerset County to make an investigation and report in opposition to Plan "C." His report dated March 9, 1925 (Exhibit S. 1, R. 172), was made to the Freeholders for the purpose of opposing Plan "C" before the State Highway Commission. It was afterwards introduced in evidence before the Board. Among his findings are the following:

> "Third. That the part of the present highway affected by a straight line is about 124 feet shorter

than the distance involved in the relocation as proposed" (R. 173 bottom).

"Fourth. That the angle at the crossing is sharper along the line of the present highway than at the proposed location and it naturally increases the total length of the structure if located on the line of the present highway. * * *

"As to the greater expense attached to the elimination if made on the line of the present highway rather than on the proposed line, I have to say:

"It is true that the structure will be longer by about 47 feet, making a total length of the covered portion of about 121 ft. as compared to 74 feet on the proposed location, but the increased cost will not be proportional to the increased length of the structure and were it not for the difference in cost of handling traffic, I do not believe the increased cost would have been mentioned. However, so far as the state is concerned, there would be no difference in cost of the structure,—it being a railroad proposition that comes within the provisions of the Fielder Grade Crossing Act. P. L. 1913, p. 91" (R. 174, 175).

At the hearing before the Board Mr. Wasser testified that he objected to Plan "C" because the present highway where it crosses the line of the railroad is on a tangent and the State Highway Commission is spending millions of dollars to straighten all highways. To place the highway at the new location as shown by the plan prepared by the Highway Department (Plan "C") would make a curve in the highway. He also testified:

"and another thing in favor of the new location was that the angle was not so sharp. * * *. It would be cheaper in the new location, * * *" (R. 194).

In his opinion the plan on the present line of the highway was more practical and desirable. His objection was both on account of the center column (a feature which the

Board adopted in its own plan) and the curvature in the road, but principally to the curve. He further testified:

> "I am not speaking of the danger of the curve. A 6-degree curve is a safe curve. If it is not necessary to change the alignment of the road it is poor policy to change it, in view of the fact of all the money being spent to straighten the highways. A curve would not be more dangerous with a bridge than without it; that is, a six-degree curve, that is perfectly safe even with the bridge there * * *. I agree that the elimination project as a whole will be considerably less expensive if you put in this curve than if you go through on a straight line. As an engineer I think it advisable to consider matters of economy in the expenditure of the public or even private moneys, provided you do not produce a condition that is dangerous or inconvenient. * * * A six-degree curve seems to be an accessible curve for all conditions" (R. 195).
>
> "A six-degree curve is safe. The fact that this curve would be in connection with an under-pass with tracks elevated above and with columns or pillars in the center of it, would not change my opinion at all" (R. 196).

The witnesses Vannemann and Diehl also testified for the appellant before the Board but, as their affidavits in this case contain substantially the same testimony as they gave before the Board, their testimony is included in the following summary of the testimony in this case.

II.

Summary of Affidavits.

The Qualifications of the Witnesses for the Appellant.

At the hearing before the Board and in the affidavits annexed to the bill of complaint and presented on the return of the order to show cause, appellant presented the following witnesses:

Mr. William R. Johnston is a graduate of Cornell University as a civil engineer. For eight years he was Terminal Engineer, and for the past two years has been Engineer of Grade Crossings of the appellant. He has had twenty-two years' experience in railroad engineering exclusively (R. 51).

Mr. George T. Hand has been engaged in railroad and highway crossing engineering projects for the past thirty-eight years, and is Chief Engineer of the appellant in full charge and supervision of all engineering and construction projects for its entire railroad (R. 57, 58).

Mr. George C. Diehl is a civil engineer who has specialized in highway engineering for over thirty years. For thirty-two years he has been connected with the Highway Department of the State of New York (ever since the passage of the first highway acts) as consulting engineer. For the past twenty-nine years he has also been County Engineer of Erie County (New York), which is the largest county in the state (and includes the City of Buffalo), and makes the largest expenditures for highways of any county in that state. During these thirty odd years he has also been consulting engineer for more than fifty different municipalities. For twelve years he was head of the National Road Improvement Committee of the American Automobile Association, and as such made a study of highway conditions in every state in the United States. Since the advent of the automobile he has had a great deal to do with the improvement of highways and the

elimination of grade crossings (R. 74). He has made a thorough study of 356 railroad grade crossings in Erie County (New York) and a considerable number elsewhere in New York State. He has had direct supervision of the building of 2,000 miles of road in Erie County, and between 8,000 and 10,000 miles of road elsewhere in New York State. He has inspected the crossing in question, made a study of the situation of the crossing, the highway and the general condition at both and of the locality, and carefully examined Plan "C," and is familiar with the scheme of elimination contemplated thereby. He was present and testified at the hearing of the Board on March 17, 1927 (R. 75, 202).

Mr. Charles R. Vanneman is a graduate of Cornell University as a civil engineer. For five and a half years he was employed by the Pennsylvania Railroad as a civil engineer in the maintenance, operating and construction departments. For the past seventeen years he has been associated as an engineer with the Public Service Commission of New York State as Chief Engineer of the Division of Transportation, Chief of the Division of Steam Railroads, Engineer of Grade Crossings, successively, and for the past six years has been and now is Chief Engineer in charge of all engineering matters pertaining to public utilities subject to the jurisdiction of that commission. All grade crossing elimination work in the State of New York, over which the Public Service Commission has control, comes entirely under his jurisdiction from the inception of the project, through the hearings (many of which he personally conducts), and, upon the completion of the hearings, he recommends to the commission for adoption an order determining how each elimination shall be made (R. 65, 196). He examined the crossing in question and made a study of the conditions existing there, and of Plan "C" (R. 69), and testified at the hearing before the Board of Public Utility Commissioners on February 10, 1927 (R. 66, 196).

Curvature.

The sole objection to Plan "C" (as revised) related to curvature. On that plan both ends of the relocated section are curved, not to exceed 6 degrees at any point, but the approaches to the under-crossing are straight for a distance of 130 feet on the southerly side, and for a distance of 245 feet on the northerly side, providing a tangent 375 feet long at the under-crossing. The greater part of the curved section of the relocated highway on both sides of the railroad is outside of any depression and is at or above the level of the surrounding country (R. 43, 80).

Mr. Diehl states the different circumstances which render curves either necessary or desirable. He says that the general practice where highways cross streams is to introduce curves for the purpose of bringing the highway across the stream as nearly at right angles as possible, and that in the elimination of grade crossings the practice is seldom, if ever, to cross at a sharper angle than 45 degrees (R. 83).

To illustrate the significance of a 6-degree curve, he says that if a copper penny is placed upon the pavement 10 feet in front of an automobile so that the right edge of the penny is absolutely in a straight line with the front wheel of the automobile; if the automobile proceeds on a 6-degree curve the wheel would pass over the left edge of the penny. A 6-degree curve produces a divergence from a straight line, in the course of that 10 feet, of only five-eighths of an inch. Mr. Diehl says that this example also illustrates that even the most careful driver, using extreme caution and accuracy, cannot travel in an absolutely straight line and will, in the ordinary course of travel on a straight road, describe arcs that are equivalent to a 6-degree curve (R. 84).

Plan "C," with its 6-degree curves, was prepared and approved by the State Highway Commission (R. 39, 136).

This curvature was not an inadvertence. It was intentional and for a purpose. It was proposed and adopted by the State Highway Commission "on account of the considerable saving that would be effected thereby," and because "a much shorter under-pass and speedier construction would be accomplished by means of the new line as adopted" (Minutes, April 22, 1924) (R. 137), and to avoid "an additional 42 feet of covered roadway" (Minutes, June 18, 1924) (R. 138).

The several discussions of the local residents who objected to these curves produced in the minds of the members of the State Highway Commission, "no additional facts not already before the State Highway Engineer or State Highway Department • • • which would lead the Highway Commission to alter its opinion in regard to the advisability of the change as contemplated in the original plans (Plan "C") (Minutes, June 24, 1924) (R. 139).

This plan was not considered objectionable to that commission because it "involved only a six degree curve which is not considered serious by the State Highway Commission" (Minutes, April 22, 1924) (R. 137). A 6-degree curve was not a novelty in the State Highway system. At the hearing which the State Highway Commission held at Somerville for the benefit of the local objectors, Commissioner Jelin "explained to the residents that if a straight line was adopted for Route 16 there would be an additional 42 feet of covered roadway over that proposed" and he "pointed out that there are other points on this route where the curvature is 6 degrees or more." In his report to his fellow Commissioners he said "that he had no recommendations to make" and "that at the conclusion of the meeting it appeared that all of the questions in the minds of the local residents had been cleared up" (Minutes, June 18, 1924) (R. 138, 139). Exhibit "D" (R. 128) shows that between the Morris Township line and Labaw's

Corner, a distance of 27.38 miles, on the same highway, there are eighteen other locations where curves exceeding 6 degrees exist on the improved and permanent alignment of this highway.

Mr. Diehl says:

Curvatures of 6 degrees, as proposed in Plan "C," are not dangerous and do not decrease the facilities for traveling. A series of tests and experiments conducted by him over a period of seven or eight years, to ascertain what degree of curvature would be dangerous or would curtail or impede traffic, shows that even in the vicinity of centers of large populations on highways of two or more lanes of traffic, 6-degree curves do not increase danger or diminish the capacity of the highway, and create no substantial difference in point of danger or highway capacity from those of a straight road (R. 76). In a number of instances, which he mentions in his affidavit, he has recommended on important main state highways having four 10-foot lanes of traffic, reverse 6-degree curves to accomplish a grade crossing elimination on straight highways by the construction of an under-pass on a less acute angle, exactly as proposed in Plan "C" (R. 77, 78). The fact that part of the relocated highway will be depressed, or that these depressions approach a bridge, does not alter his opinion, as the road is laid out on Plan "C." The adoption of Plan "C" will create no more danger or inconvenience to public travel than there would be on the straight highway contemplated by the Board's plan. So far as the center piers are concerned, there will be no difference, in point of danger or inconvenience, between Plan "C" and the Board's plan (R. 78).

His tests show that an automobile can be driven at speeds up to forty or forty five miles per hour on a 6-degree curve with the same degree of safety as on a straight road.

At a speed of forty or forty-five miles per hour an automobile can be brought to a stop in a distance of less than 200 feet, and on curved sections of highways, containing no obstructions to view within that distance, it is unnecessary and uneconomical to reduce 6-degree curves.

He is familiar with snow and ice conditions on highways and Plan "C" would not present any danger or inconvenience to public travel under ice and snow conditions. These conditions always slow up travel whether on straight or curved highways, and these conditions would not alter or affect the relative conditions as between a straight road and a 6-degree curve (R. 82).

The center pier on Plan "C" is not on or near a curve. Plan "C" provides straight approaches to the bridge of 130 feet long on the south side, and of 245 feet on the north side. As a matter of fact, there are certain advantages on a 6-degree curve to drivers of vehicles following other vehicles, especially if the preceding vehicle is a large truck that obstructs the view ahead (R. 80, 81). While it is true that the State Highway Commissions of New York and New Jersey are constantly eliminating curves, they are not spending any money to eliminate 6-degree curves. He is now engaged in projects for the elimination of at least 100 curves on New York State Highways, but all of them are sharper than 6 degrees. At the same time he is, in a number of instances, changing straight highways by introducing 6-degree curves (R. 81, 82).

He points out that in driving on a perfectly straight highway, vehicles frequently describe arcs equivalent to a 6-degree curvature, especially in passing other vehicles or objects on the road (R. 76).

Mr. Diehl says that curves are necessary and desirable in many cases, of which he specifies five, including the crossing of streams and railroads. In the case of rail-

roads it is desirable to cross, as nearly as possible, at right angles and seldom, if ever, at angles less than 45 degrees (R. 83). A radius of 1,000 feet (6 degrees) assures every convenience as far as rates of speed, safety and capacity of highways are concerned, as can be obtained on a straight highway (R. 84).

Mr. Vanneman says:

In his opinion a 6-degree curve on an important highway is perfectly safe and gives his reasons (R. 68). He cites a number of instances in New York State where, under circumstances like the present, the Public Service Commission of that state, on his recommendation, has eliminated grade crossings on straight highways by relocating the road and introducing 6-degree curves to shorten the under-crossing (R. 66, 69, 70). Plan "C" will not result in any lessening of the capacity of the highway to carry traffic or increase the dangers to such travel as compared with a straight road (R. 68). A major portion of highway accidents occur because of collisions of one vehicle with another on tangents. (This is also the opinion of the New Jersey State Highway Engineer (R. 173).) The statistics of New York State for 1925 show that, although there is a great deal of curvature on the highways of that state, owing to its hilly and mountainous nature, there were 23,880 automobile accidents on straight, level roads and only 1,316 such accidents on curves (R. 67, 68).

Within certain limits, travel on a curve is safer than on a straight road. A curve with a radius of 1,000 feet (6 degrees), with the usual super-elevation, is so slight that the highway traveler does not know he is on a curve. On such a curve there would be no danger of skidding unless the traveler tried to operate at sixty miles per hour on an icy roadway. In a fog or at night, a 6-degree curve is no more dangerous than a straight road (R. 68).

Mr. Wasser, the only engineer who testified against Plan "C" (revised) at the hearings before the Board (R. 194), he objected to curves as a matter of policy, but he admitted that "a 6-degree curve is a safe curve," "is perfectly safe." "A 6-degree curve seems to be an *accessible* curve for all conditions" (R. 195).

There was no engineering or other expert testimony that a 6-degree curve was in the least degree dangerous (R. 41).

Depression.

Of the entire length (2,250 feet) of this relocated section, only 900 feet is depressed, that is, 500 feet on the northerly side, and 400 feet on the southerly side, of the center line of the proposed under-crossing. On the northerly side of the railroad the northerly 265 feet of this 500 feet of depressed roadway is on a curve, the deepest point of which is 5½ feet, and only 100 feet thereof is more than 3 feet below the general level of the adjacent land. On the southerly side of the railroad the southerly 240 feet of the depressed roadway is on a curve, the deepest point of which is 7 feet, but only 60 feet thereof is more than 5 feet below the general level of the adjacent land (R. 43, 58).

Highway Embankments.

The embankments on each side of the depressed section of the roadway are sloped at the uniform rate of 1½ feet horizontal recession to each 1 foot of vertical rise. So that these embankments recede from the roadside (the outside of the gutters) at the rate of 9 feet for each 6 feet of elevation (R. 43).

Views.

Taking into account the recession of the sloping embankment, at no point in the entire 900 feet of depressed

roadway is the embankment near enough or high enough to interfere, in the least degree, with the view of the driver of any class of vehicles (R. 43, 44, 79, 80).

Mr. Diehl points out that a slight curve, like a 6-degree curve, affords a better view than a straight road, particularly for the driver of a vehicle that is following another vehicle like a big truck. This is true of the view ahead, both as to vehicles going in the same, or coming from the opposite direction (R. 80).

Mr. Vanneman, in his affidavit, says that Plan "C" provides an ample view through the structure (R. 68).

Division of Travel.

The Board's plan and Plan "C" both call for the center pier. This type of construction is the accepted standard for under-crossings of more than 30 or 32 feet in width, and is desirable for the purpose of dividing the line of travel on the highway, because of the natural tendency of highway travelers to pull away from the curb toward the center, and the resulting cutting down of a four-line to a two-line traffic highway. In cases of a two-line highway, such as is contemplated by Plan "C," such a condition could not prevail. By this plan two lines of traffic can pass simultaneously (in opposite directions) on each roadway under the bridge (R. 67).

Feasibility and Practicability.

This plan was designed and originally prepared by the State Highway Engineer, and after some revisions it was agreed to by the Railroad Company, and officially approved and adopted by the State Highway Commission, and, by its direction, the State Highway Engineer and the Bridge Engineer of the Commission signed it on December 12, 1924 (R. 39, Exhibit "F," R. 145-150). Its design, feasibility, suitability and practicability were not only

officially determined by the Commission, but were repeatedly approved and defended by it (Minutes, March 11, R. 136, April 22, R. 137, June 18, R. 138, and June 24, 1924, R. 139). This action was never modified or rescinded by the State Highway Commission (Certified Minutes of State Highway Commission, R. 134 to 144, inc.).

Mr. Johnston says, in his affidavit, that Plan "C" is an entirely feasible and practicable plan and that the Board's plan for a straight highway has no practical advantages over Plan "C," in spite of the vast difference in cost (R. 44).

Mr. Hand says that Plan "C" provides a safe, adequate and proper means of eliminating this crossing in a manner that fully meets the requirements of public safety and convenience and without introducing any element of danger to or impediment of traffic to the fullest capacity of the highway; that the plan adopted by the Board contains no elements of safety or convenience to highway traffic to justify the increased cost (R. 58).

Mr. Vanneman says that he has examined the crossing and studied Plan "C" and has supervised and approved plans similar thereto at a number of locations on important state highways in New York State, which he mentions (R. 69), that Plan "C" is entirely feasible and practicable and safe for the crossing in question and would not result, in any way, in lessening the capacity of the highway to carry traffic or in any condition of danger to such travel (R. 67).

Property Damages.

The railroad engineers' estimates included $1,000 for land required for and damages that might result to other property from the adoption of Plan "C." This amount was, in the judgment of plaintiff's engineers and real estate experts, sufficient for the purpose, since the appel-

lant owned a large part of the land required and the property consists of farm land in a rural farming community and no privately owned buildings or improvements would be affected (R. 44). The Board's estimate contained nothing for property damages (R. 93).

Sidewalks.

Plan "C," as prepared and adopted by the State Highway Commission, provided no sidewalk spaces.

The Board's plan required a sidewalk with a clear width of 8 feet 6 inches on *each* side of the highway (R. 91).

There was no evidence before the Board of Public Utility Commissioners to show that two sidewalks were necessary. (See stipulated statement of testimony (R. 178 to 212 incl.) And Mr. Johnston says that they are unnecessary, since the crossing is in a rural locality, and there are no sidewalks along Highway Route No. 16 on either side of the railroad or in the vicinity of the crossing; that at most, public convenience would not require more than one sidewalk; and that the increased cost of providing two sidewalks is unjustified by the evidence or by public necessity and convenience; the cost of the plan is materially increased by the provision of sidewalk spaces (R. 51).

Camp Lane Crossing.

This crossing is located on an unimportant (R. 178) unimproved road, 1,220 feet easterly of Route No. 16 crossing (R. 45). The elimination of this crossing is not necessary to and will not be physically affected by the elimination of Plan "C" according to either Plan "C" or the Board's plan (R. 46). However, the Board ordered the closing of this crossing, and the construction by the plaintiff of a connecting road 1,940 feet long between Camp Lane and Route No. 16 along the southerly side of,

and at distances ranging from 225 to 420 feet from the railroad (Map, part of Exhibit "A," R. 116-117), (R. 45, 46) at a cost estimated by the Board's Engineer according to the Board's plans at $10,450.00 (R. 93, 188, Exhibit "J," R. 158), and by the appellant's engineer according to Plan "C," at $7,660.23 (Exhibit "J," R. 155).

The plaintiff offered to close the Camp Lane crossing and build a similar but shorter connecting road on the same side, but closer to the railroad (Exhibit "G," 151). This offer was rejected by the Board (R. 125).

The affidavit of Mr. Steele (R. 72, 73) shows the following highway traffic record at Camp Lane crossing for Friday, June 3rd, Saturday, June 4th, and Sunday, June 5, 1927, covering the time from 7 A. M. to 8 P. M. (thirteen hours) each day:

	Date	*Autos*	*Trucks*	*Pedestrians*	*Bicycles and Motorcycles*	*Wagons*	*Total*
Friday.	June 3	68	40	38	12	9	167
Saturday.	June 4	68	37	16	16	3	140
Sunday.	June 5	70	13	53	16	5	156

The Chief Engineer of the Board offered in evidence (R. 178) a traffic record at the same crossing for Friday, November 12th, and Saturday, November 13th, from 6 A. M. to 12 P. M., showing the following average use of the crossing: Pedestrians 17.5; automobiles 86; other vehicles 2.5; passenger trains 17.5; freight trains 35.5; light engines and drills 10 (Exhibit C. 5, R. side fol. 125 f, between pp. 170-171). Clear and unobstructed views of the Camp Lane crossing and of the vicinity are shown in Exhibit C. 4 (R. fol. 122, between pp. 170-171). There was no testimony whatever before the Board on the subject of danger to or impediment of highway travel at Camp Lane crossing, aside from what these exhibits may show.

The Width of the Highway.

Plan "C," as prepared and approved by the State Highway Commission (Exhibit "F," R. 145-150), provides for two roadways each having a clear width of 18 feet (Minutes of State Highway Commission, March 11, 1924) (R. 136). A certified copy of the road records, as recorded in the Somerset County Clerk's office (Exhibit "K," R. 159, l. 29), shows that the legal width of this highway is 33 feet (R. 36, 201). The traveled portion is an average of 20 feet in width and the improved modern pavement laid by the State Highway Commission thereon is 18 feet wide (R. 36). If the under-crossing is constructed to a width of 66 feet, according to the Board's plan, both abutments and half of the under-crossing will be on private property outside the limits of the highway.

In some other places not adjacent to the railroad the State Highway Commission has increased the width of this highway (R. 51). The State Highway Commission contemplates acquiring an additional 33 feet on either side of the railroad (R. 201) but has not done so yet.

In the center of the Borough of Somerville, but a few miles away, the new under-crossing recently constructed to carry this highway under the Central Railroad of New Jersey provides a space between abutments of 54 feet, with a roadway having a clear width of but 36 feet and two sidewalk spaces each having a clear width of 7 feet. That under-crossing is located in the center of the business section of Somerville and serves a large amount of local travel, since the railroad divides the borough and this is one of a limited number of crossings available for passing from one part of the borough to the other (R. 51, 52).

About a thousand feet away from the crossing in question (Royce Valley) at Dukes Corners, the State Highway Commission recently widened the highway on a sharp turn to 50 feet, of which it paved only 20 feet (R. 52).

Mr. Vanneman says that Plan "C," as originally offered by appellant before the Board as "Exhibit R. R. 1," provides for two lanes of traffic on each of the two roadways thereunder (R. 67). Both Mr. Vanneman (R. 67) and Mr. Diehl (R. 76) say the capacity of the highway will not be diminished by the proposed 6-degree curves, not only because that degree of curvature does not diminish capacity or speed, but also because the under-crossing itself is on a tangent and has straight approaches of 130 feet on one side and 245 feet on the other (R. 67, 75).

The Question of Economy.

Mr. Johnston and Mr. Hand, in their affidavits, show that Plan "C" as approved and adopted by the State Highway Commission, was estimated by the State Highway Engineer on March 11, 1924, at $109,024 (R. 136), and by the railroad engineers (including land and damages) at $145,024.47 (Exhibit "I," R. 155). The estimate of the Chief Engineer of the Board of Public Utility Commissioners on the Board's plan was $324,400 (R. 93). The estimate of the railroad engineers showed that Plan "C" could be changed so as to provide the same roadway and sidewalk spaces as the Board's plan for an additional $52,500 (Exhibit "I," R. 155). So that the difference in cost between Plan "C" and the Board's plan (using the railroad engineers' figures) was $179,375.53 or $124,875.53, according to whether we figure on Plan "C" as approved and adopted by the State Highway Commission, or as enlarged to provide the same roadway and sidewalk spaces as shown on the Board's plan.

Mr. Hand, who, as Chief Engineer of the plaintiff, has full charge and supervision (and responsibility) of all engineering and construction projects on the entire railroad, and who is familiar with the crossing and with Plan "C" and the Board's plan, says, in his affidavit, that the Board's plan is a wasteful extravagance of the plaintiff's

earnings which should be conserved for use in furnishing safe, adequate and proper transportation facilities and for improvements necessary, within the limits of reasonable economy, for public safety and convenience (R. 58). If the Board's plan is carried out, it will involve a reckless and useless waste of from $120,000 to $170,000 of money which will benefit nobody, and to that extent will prevent the plaintiff from providing safe, adequate and proper service and from making reasonable expenditures for necessary public improvements. The plan ordered by the Board is one which he could not recommend to or justify before the directors or stockholders of his company as a reasonable and necessary project, because of the unnecessary and excessive expense involved therein. The necessity for economy in each and every grade crossing elimination project, regardless of its individual cost, is shown by the schedule of grade crossings on his railroad which he gives in his affidavit (R. 60). In the order of their importance (as to danger and impediment to public travel), if eliminated by reasonable and economic means and plans, would cost in the neighborhood of $108,000,000, or for the most dangerous (Class A) about $24,500,000; for the next dangerous (Class B) about $27,000,000; for the least dangerous (Class C) about $58,000,000 (R. 60).

Mr. Diehl, in his affidavit, says that the basis of all improvements, whether it be by steam, water or highway, is the question of economy of construction and maintenance, which is always taken into account in designing and carrying out such improvements. The question of the justification of such an expenditure depends largely on the cost per mile, and in practically every instance where he has constructed a highway, whether it has involved the elimination of grade crossings or not, careful consideration has been given to the amount of travel and the justification for the expenditure. In the construction of highways and in the elimination of grade crossings, the slogan has been generally adopted that highway dollars must pay

their way and they should not be squandered in the construction of roads or in building for highway travel by unreasonable or unnecessarily expensive plans or designs, any more than for any other means of transportation (R. 76, 77).

He cited the case of the Main street crossing in Buffalo, where he, as the engineering representative of the public authorities, recommended, and the Public Service Commission of New York State ordered, the elimination of a 25-degree grade crossing on an important highway having four 10-foot traffic lanes, by changing the highway from a straight road to a new location having reverse 6-degree curves, with a 45-degree under-pass, in order to greatly reduce the cost (almost cutting the cost in half) (R. 77, 78).

If the introduction of 6-degree curves at the Royce Valley crossing (the one here in question), according to Plan "C," would, as appears from the estimates, result in the saving of $120,000 or more, he is of the decided opinion that such curvatures should be adopted (R. 78).

In the case of another Broadway crossing, near Buffalo he recommended and caused the adoption by the Public Service Commission of New York State of a plan for eliminating a grade crossing on a straight highway by introducing 6-degree curves, in opposite directions, in substantially the same manner as proposed by Plan "C," for "good and sufficient reasons, namely, reasons of economy" (R. 81).

Mr. Diehl gives five different reasons for the introduction of curves on highways. Every one of those reasons are founded upon considerations of economy (R. 83).

Mr. Vanneman, in his affidavit, says that he is familiar with several instances (some of which he mentioned) in which he has supervised and approved plans for grade crossing elimination on state highways in New York similar to the method proposed by Plan "C," where similar

curves have been introduced in straight highways for the sake of economy. The reason for using such curves is that it reduces the skew angle of the bridge, thereby shortening the length of the span, and makes a material reduction in the cost of the improvement (R. 69, 70).

At the Broadway crossing, near Buffalo, which was on one of the most important east and west trunk highways in the State of New York, the Public Service Commission of that state, on his recommendation, ordered a plan which diverted the highway and changed a skew angle of 20 degrees on a straight highway to a 45-degree angle undercrossing with reverse 6-degree curves, resulting in a great deal of saving of expense (R. 66).

He considers that it is necessary and advisable in grade crossing eliminations to consider the question of economy in construction where the resulting conditions will not be dangerous or detrimental to the public and that practice is followed by him and the New York Public Service Commission (R. 66, 67). He usually expects to eliminate crossings of the character here involved for $125,000 (R. 70).

The reason why he is careful to consider economy in improvements of this kind is that he would hate to spend money recklessly for such a purpose. In the State of New York the statute divides the expense 50 per cent. to the railroad and 50 per cent. to the state and municipalities, so that questions of economy are important to the public as well as to the railroad companies, curves are introduced primarily not because of the topography of the country, but because it is a question of keeping the cost down as low as possible consistent with safety (R. 70).

Under the practice in New York State, under his direction, he would introduce curves to eliminate a crossing on a straight highway if he could save twenty or thirty thousand dollars thereby, working on the principle that every dollar he can save in that way can be applied toward the elimination of some other grade crossing (R. 71).

APPENDIX "B."

CHAPTER 57.

A Supplement to an act entitled "An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April twenty-first, one thousand nine hundred and eleven.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Whenever a public highway and a railroad cross each other at the same level and it shall appear to the board that such crossing is dangerous to public safety, or that the public travel on such highway is impeded thereby, the Board of Public Utility Commissioners may order the company operating such railroad, within such time as said board may fix, to alter such crossing according to plans to be approved by said board, by substituting therefor a crossing not at a grade of such public highway either by carrying such public highway under or over such railroad, or by reconstructing such railroad under or over such public highway, or by vacating, relocating or changing the lines, width, direction or location of such highway and the opening of a new highway in the place of the one ordered vacated.

2. The entire expense of such alterations, changes, relocation or opening, including damages to adjacent property, shall be paid by such railroad, unless a street railway uses such crossing, in which event the board may order not exceeding ten per centum of such expense directly chargeable to the crossing used by the street railway company, to be paid by the company operating such street railway and the balance to be paid by the company operating such railroad.

3. The expense of removing relaying or relocating any municipal water or sewer pipes or other municipal pipes, conduits or subways, shall be borne by the municipality owning the same and also the expenses of paving, curbing and flagging the highway constructed as the result of the change of grade.

4. Where the order of said board shall require changes in, or the removal of the property or constructions of any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company or corporation, copartnership or individual, they shall, at their own expense, move or change the grade or location of their property or constructions in conformity with the order of said board. They shall be deemed parties in interest and shall be given notice of hearing and an opportunity to be heard.

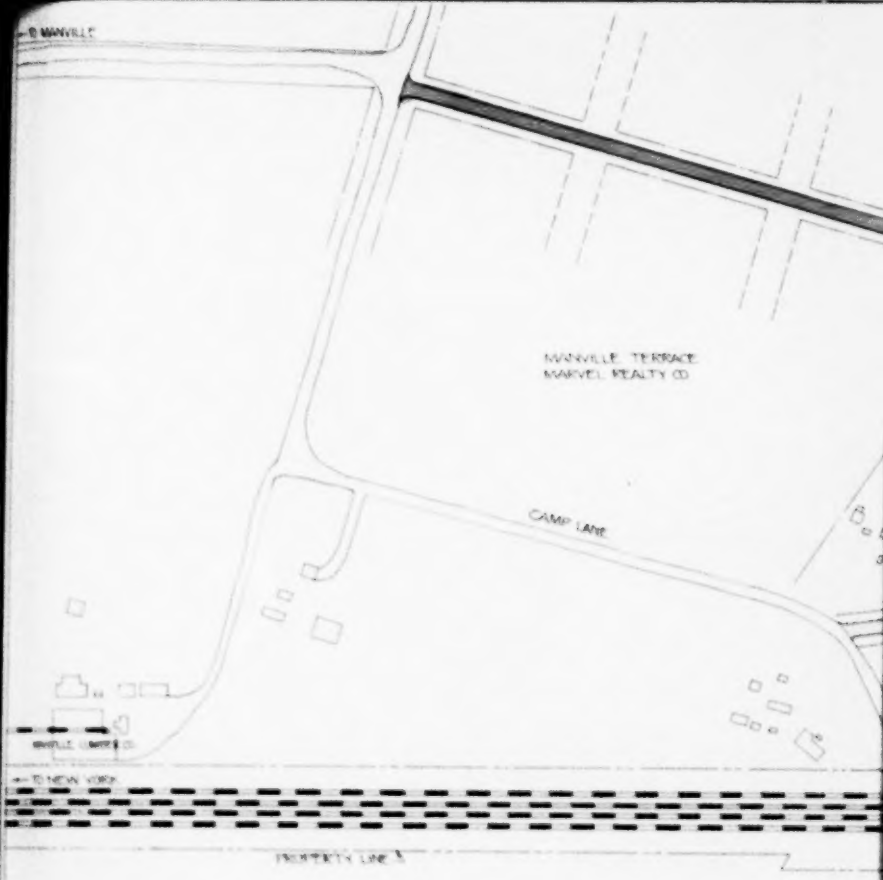
5. The board or body having charge of the finances of any municipality wherein any such crossing exists, may present to the Board of Public Utility Commissioners a petition in writing setting forth the facts upon which relief under this act is sought, or upon the petition of any railroad company whose tracks cross or are crossed at grade, or said Board of Public Utility Commissioners may, of its own motion, proceed with respect to any such crossing; whereupon said Board of Public Utility Commissioners shall fix a time and place for a hearing before it and shall give such notice thereof as it shall deem reasonable to the municipality and corporations, copartnership or individuals interested therein and after such hearing shall determine or order what, if any, alterations to or changes in or connected with such crossing and public highway shall be made.

6. All the powers, supervision, regulation of, jurisdiction and control over public utilities granted by the act to which this is a supplement, are hereby vested in the Board of Public Utility Commissioners and courts of this

State as may be necessary to carry the provisions of this act into effect.

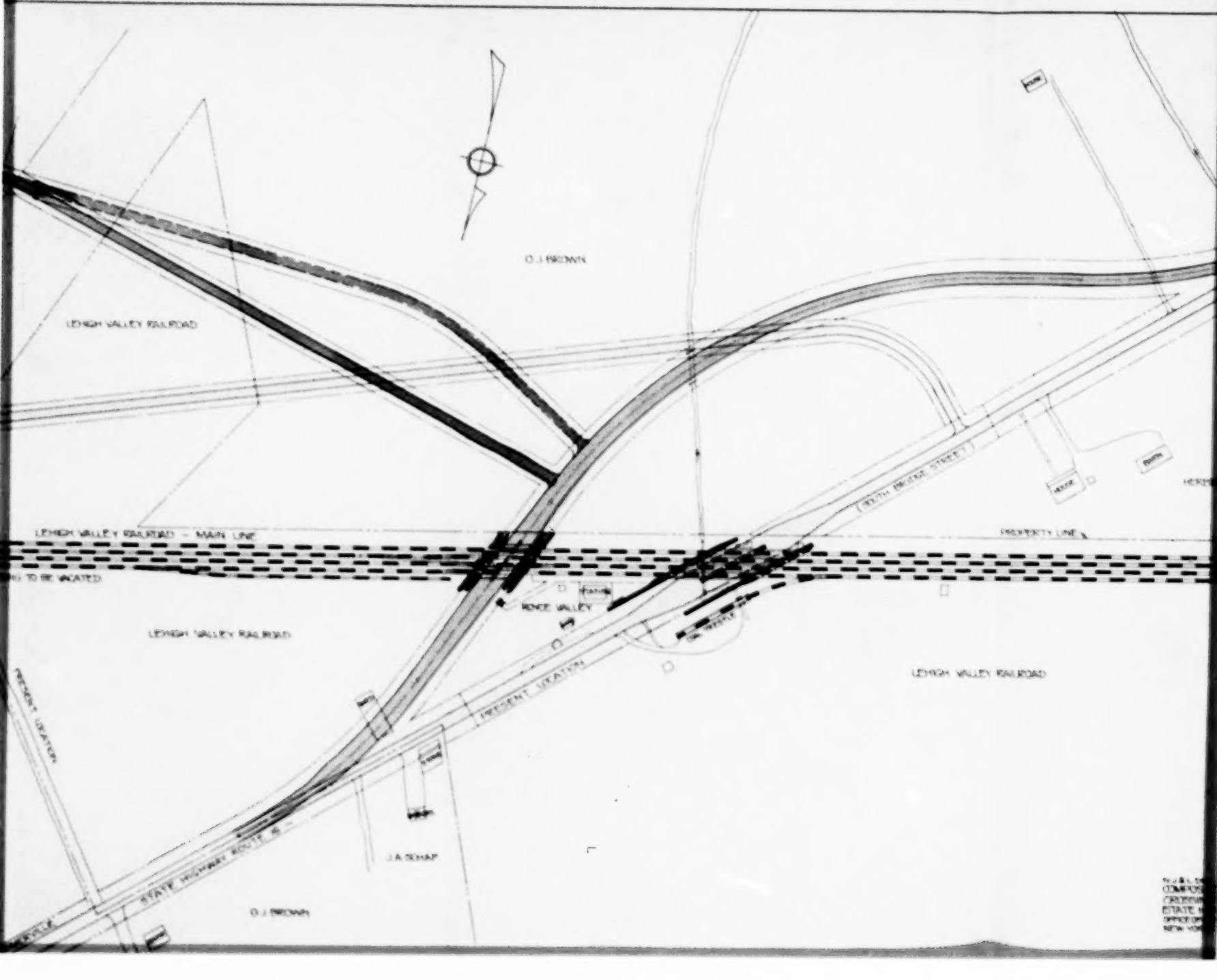
7. This act shall take effect immediately.

Approved March 12, 1913.

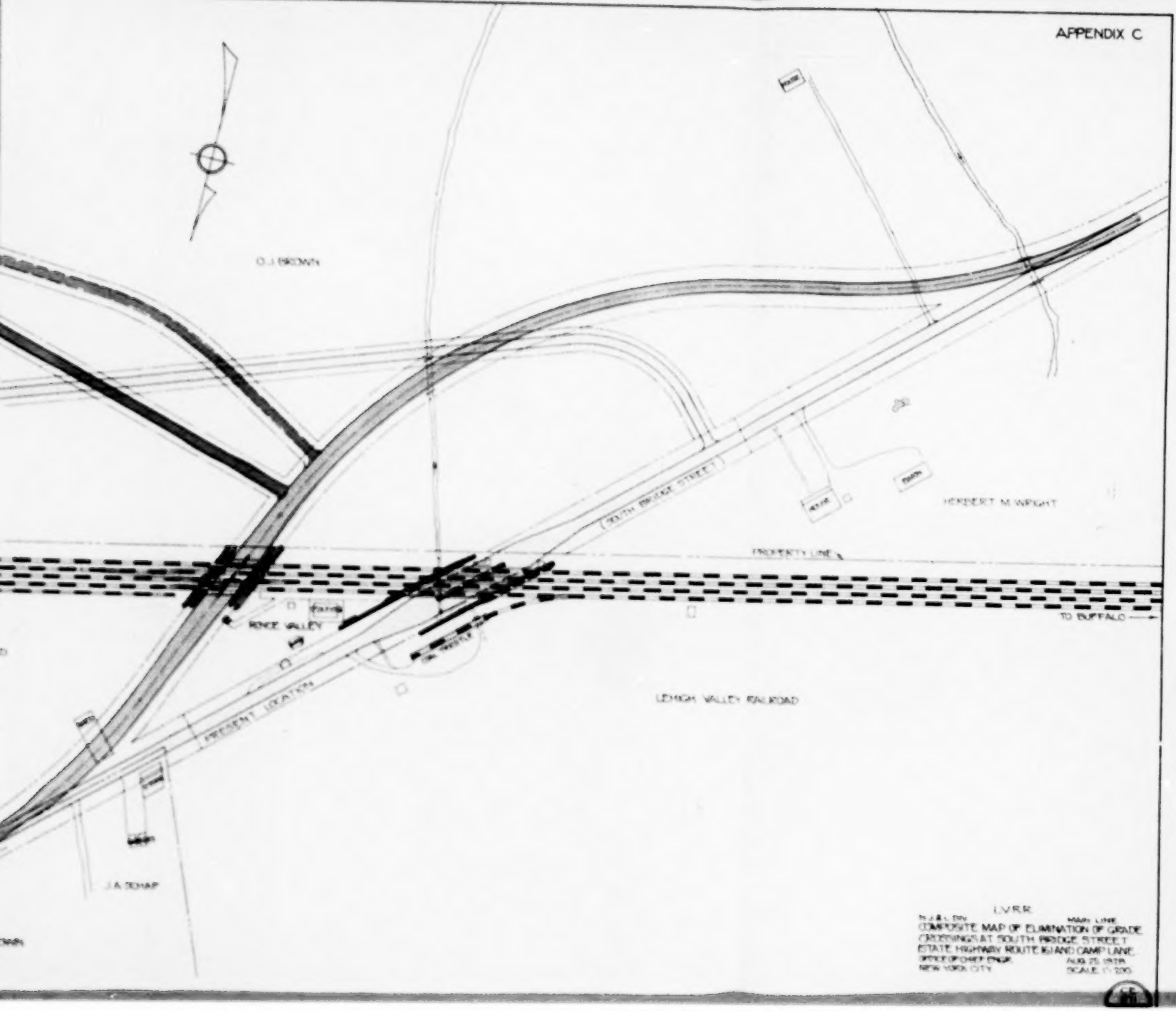


LEGEND

COLOR INDICATION	PLAN	EXHIBIT BEFORE BOARD	EXHIBIT HEREIN	RECORD REFERENCE
YELLOW	BOARD'S PLAN	P.B.	PART OF A	R.(N.J.T.)
RED	PLAN C	BR 1	C	R.(2)
BLUE	CAMP LANE	BR 2	G	R.(5)
BROWN	CAMP LANE (REVISED)	BR 3	G	R.(5)
GREEN	PLAN C ENLARGED	-	(NO EXHIBIT)	R.(3)


O.J. BROWN
LEHIGH VALLEY RAILROAD
LEHIGH VALLEY RAILROAD - MAIN LINE
PROPERTY LINE
TO BE VACATED
RENCE VALLEY
LEHIGH VALLEY RAILROAD
LEHIGH VALLEY RAILROAD
PRESENT LOCATION
PRESENT LOCATION
J.A. BEHAP
STATE HIGHWAY ROUTE 6
O.J. BROWN

APPENDIX C


O. J. BROWN
SOUTH BRIDGE STREET
HERBERT M. WRIGHT
PROPERTY LINE
TO BUFFALO
ROYCE VALLEY
PRESENT LOCATION
LEHIGH VALLEY RAILROAD
J. A. SCHAP
L.V.R.R.
MAIN LINE
COMPOSITE MAP OF ELIMINATION OF GRADE CROSSINGS AT SOUTH BRIDGE STREET, STATE HIGHWAY ROUTE 80 AND CAMP LANE
AUG. 25, 1928.
SCALE 1" = 200'
NEW YORK CITY